SECTION 3

COMPENSATION FOR NOISE, FLOODING, POLLUTION, EROSION, OR LOSS OF VISIBILITY OR VIEW

Beginning in the 1800s, American courts began to recognize a number of "abutter's rights" enjoyed by property owners along public roads…. These rights, described as being in the nature of easements and "deduced by way of consequence from the purposes of a public street"…, include the right of access to and from the road, and the right to receive light and air from the adjoining street…. Judicial recognition of these rights derives from the perceived expectations of those who own or purchase property alongside a public street, to the effect that the land enjoys certain benefits associated with its location next to the road…. It is well established, however, that abutter's rights are qualified, rather than absolute…."[1]

[1] Regency Outdoor Adver., Inc. v. City of L.A., 39 Cal. 4th 507, 517, 139 P.3d 119, 124, 46 Cal. Rptr. 3d 742, 748 (2006) (citations omitted).

A. COMPENSATION FOR NOISE DAMAGE

The genesis of claims for noise damage may be traced to cases brought against railroads in which it was widely held that, regardless of whether the constitutional provision applied to a taking or a taking or damaging of property, such claims were *damnum absque injuria*.[2] As for highways, it was held that noise that affected all property owners the same in the neighborhood constituted general damages only and was not compensable.[3]

Nevertheless, the question of whether a property owner may recover damages for noise regardless of whether there has been a partial taking resulted in a number of judicial positions on the subject. There are cases denying compensation under any circumstances;[4] however, there also are cases permitting compensation for damages caused by the entire public improvement[5] or only for damages caused by the portion of the improvement that is located on condemned land.[6] There are cases permitting the recovery of damages when the remaining land is put to a special use, such as a school or a church,[7] when the effect of noise is special or peculiar to the land taken,[8] or when the entire beneficial use of the property is destroyed.[9] Finally, "[a] few courts recognize noise impact as a factor [that contributes] to the decrease in market value of the remaining area, rather than as a separate item of severance damages."[10]

As discussed below, cases involving claims for noise damages appear to fall into two major categories—those involving a partial taking of the landowner's property and those in which there is increased noise resulting from a highway but no part of the owner's property was taken for the project. If there is no physical taking of the owner's property, there is ordinarily no claim for damage due to noise unless there is a showing of special damage to the abutting land.[11]

A.1. Partial Taking of Property and Compensation for Noise

A.1.a. Compensation for Noise Damages Along With Other Severance Damages

As held in *State by Commissioner of Transp. v. Carroll*, *supra*, although the record in that case was insufficient to permit compensation for increased noise, in a proper case noise damages may be compensable as one factor affecting the market value of the land.

> We have stated that "*all* material facts and circumstances" that could influence potential buyers of the remaining parcel should be considered in valuing that property for purposes of determining severance damages. *Commissioner of Transp. v. Silver*, 92 N.J. 507, 515, 457 A.2d 463 (1983). We have also noted that a compensation award should indemnify a landowner as fully as possible and that just compensation should be regarded "'from the point of view of the owner and not the condemnor.'" *Commissioner of Transp. v. William G. Rohrer, Inc.*, 80 N.J. 462, 467, 404 A.2d 29 (1979) (quoting 4 *Nichols, Eminent Domain* § 12.21 at 12-86.1 (3rd ed. 1978)).[12]

Thus, the court held that

> [i]n an appropriate case with an adequate record, damage from increased traffic noise may be a factor that at the time of the taking demonstrably affects the market value of land. *See South Carolina State Highway Dep't v. Bolt*, 242 S.C. 411, 419, 131 S.E.2d 264, 268 (1963) (in a partial taking, market value of remainder can be affected by impact on use of remaining buildings).[13]

In an earlier case, *Dennison v. State,*[14] the court permitted noise to be considered as an element of damage to the remainder when taken into consideration

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[2] Richards v. Wash. Terminal Co., 233 U.S. 546, 34 S. Ct. 654, 58 L. Ed. 1088 (1914); Harrison v. Denver City Tramway Co., 54 Colo. 593, 131 P. 409 (1913).

[3] People *ex rel*. Dep't of Pub. Works v. L.J. Presley, 239 Cal. App. 2d 309, 311, 48 Cal. Rptr. 672, 673 (Cal. App., 3d Dist. 1966) (holding that increased noise, fumes, and annoyance that would result from the more heavily trafficked freeway are not a property interest and, therefore, are not compensable). *See also* State Highway Dep't v. Hollywood Baptist Church, 112 Ga. App. 857, 146 S.E.2d 570 (1965).

[4] New Jersey v. Carroll, 123 N.J. 308, 587 A.2d 260 (1991); State by Road Comm'n v. Williams, 22 Utah 2d 331, 452 P.2d 881 (1969).

[5] City of Amarillo v. Attebury, 303 S.W.2d 804 (Tex. Civ. App. 1957); Brannon v. State Roads Comm'n, 305 Md. 793, 506 A.2d 634 (1986).

[6] Commw., Dep't of Highways v. Williams, 487 S.W.2d 290 (Ky. 1972); Bd. of Transp. v. Brown, 34 N.C. App. 266, 237 S.E.2d 854 (1977), *aff'd*, 296 N.C. 250, 249 S.E.2d 803 (1978).

[7] State, Dep't of Highways v. United Pentecostal Church, 313 So. 2d 886 (La. App., 2d Cir. 1975), *cert. denied*, 318 So. 2d 60 (La. 1975), *cert. denied*, 423 U.S. 1018, 96 S. Ct. 453, 46 L. Ed. 2d 389 (1975); Highway Comm'r v. Bd. of Educ., 116 N.J. Super. 305, 282 A.2d 71 (1971).

[8] City of Lakewood v. DeRoos, 631 P.2d 1140 (Colo. App. Div. 2 1981); People *ex rel*. Dep't of Pub. Works v. Presley, 239 Cal. App. 2d 309, 48 Cal. Rptr. 672 (Cal. App. 3d Dist. 1966); Miss. State Highway Comm'n v. Colonial Inn, Inc., 246 Miss. 422, 149 So. 2d 851 (1963).

[9] Div. of Admin., Dep't of Transp. v. West Palm Beach Garden Club, 352 So. 2d 1177 (Fla. App. 4th Dist. 1977).

[10] State v. Carroll, 123 N.J. at 326, 587 A.2d at 269 (*citing* San Diego Gas & Elec. Co. v. Daley, 205 Cal. App. 3d 1334, 253 Cal. Rptr. 144 (1988); Miss. State Highway Comm'n v. Colonial Inn, 246 Miss. 422, at 430, 149 So. 2d 851, 855 (1963); Dennison v. State, 22 N.Y.2d 409, 239 N.E.2d 708, 293 N.Y.S.2d 68 (1968)).

[11] *See* 4 NICHOLS ON EMINENT DOMAIN § 13.23[4], at 13-204–13-205 (discussing other categories of cases in which the courts have allowed compensation for noise damage).

[12] State by Comm'r of Transp. v. Carroll, 123 N.J. 308, 327, 587 A.2d 260, 269 (1991).

[13] *Id.*

[14] 22 N.Y.2d 409, 239 N.E.2d 708, 293 N.Y.S.2d 68 (1968).

with other damages. As a concurring opinion stated, however, the court was "not, contrary to intimations in the dissenting opinion, "[accepting] future traffic noise as an element of consequential damage" …in 'quite unrestricted form…."[15] Rather, the reason that compensation for noise was appropriate in that particular case had to do with the property's "quietude, the tranquility and the privacy…, qualities which the claimant prized and desired and which undoubtedly are items that would be taken into account by an owner and a prospective purchaser in fixing the property's market value."[16]

In *Williams v. State,* [17] the State took 3 acres of a parcel of land for construction of a four-lane Interstate highway that had been covered by hardwood trees 70- to 90-ft in height. The "claimant offered proof only as to consequential loss, basing his claim primarily on the negative impact of removal of the wooded area and replacement by the highway, with the attendant loss of privacy, increase in noise and change in the character of the view."[18] The court held that "[l]oss of enhancement due to the location and esthetic qualities of a claimant's property is readily cognizable as consequential damage….It is clear that the presence of an interstate arterial in place of a preserved woodlot had a consequential effect on the market value of the premises remaining…."[19] However, in a later New York case,[20] involving a taking of the owners' property, the court held that the "[r]espondents have sustained no loss of privacy distinct from the noise factor and it would be inappropriate to award damages for increased traffic noise on the facts of this case."[21]

More recently, in *Tilcon Minerals, Inc. v. Commissioner of Transportation,*[22] the plaintiff claimed for the cost of replacement a tree-buffer removed by the transportation department. Tilcon's business was such that the noise, dust, and other pollutants would mean that without the buffer the "property is not suited for its prior use unless the tree buffer is replaced."[23] Because Tilcon had the obligation to remain in compliance with the permit issued for its business, the court held that the department's assessment of damages was insufficient to compensate the company for the effect of the taking on the remainder.[24]

A.1.b. Whether the General Versus Special Damage Rule Applies

There is an absence of judicial unanimity concerning whether there must be proof of special damage when there is a taking and a claim for damages to the remainder.

A case that appears to apply the general versus special damage rule in a taking case is *AGS Embarcadero Associates v. Department of Transportation,*[25] in which the department had condemned a portion of the owner's property for a ramp. The owner's eight-unit apartment building was located within 15 ft of the ramp that the department constructed on the property taken from the owner. The property owner alleged that traffic noise had rendered its building uninhabitable. The court agreed that the condemnee sustained damages that "were *different in kind* from those sustained by the general public."[26] Thus, it was error to exclude evidence of the effect of the noise on the remainder of the property after the taking.[27]

In a New Jersey case involving a partial taking of the owner's property, the State's supreme court held that noise damage is compensable as severance damages. In *New Jersey v. Carroll,*[28] the State sought to acquire private property to widen a highway. Although the court held that the State had engaged in good faith negotiations and properly used its "one-price offer procedure," another issue was whether the state's appraisal was deficient for failing to include damages for increased traffic noise. Although the trial court and appellate court had agreed with the owners "that noise damages may be compensable in a condemnation action, and are not restricted to those whose property is put to special uses,"[29] the Supreme Court of New Jersey reversed. The court found that in New Jersey there was "very little authority to support compensability even for 'special use' properties."[30] Indeed, the court held that "[t]here is simply no established rule that noise damages are compensable in takings of 'special use' properties" and that "other states 'are divided on the issue…."[31]

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[15] 22 N.Y.2d at 413, 239 N.E.2d at 711, 293 N.Y.S.2d at 72 (Fuld, J., concurring). *See also* State *ex rel*. Mo. Highway and Transp. Dep't v. Mosley, 697 S.W.2d 247, 248 (Mo. App., E. Dist. 1985), in which the court held: "[S]uch matters as noise, traffic, unsightliness, possible risk of explosion, inconvenience, and in this case, loss of security and privacy, while not individual, separable elements of compensation in and of themselves, may be considered as factors which contribute to a diminution in value."

[16] 22 N.Y.2d at 414, 239 N.E.2d at 711, 293 N.Y.S.2d at 72.

[17] 90 A.D. 2d 882, 456 N.Y.S.2d 528 (N.Y. App. 3d Dep't 1982).

[18] *Id*. at 883, 456 N.Y.S.2d at 529.

[19] *Id.*

[20] George v. New York, 134 A.D. 2d 847, 521 N.Y.S.2d 593 (N.Y. App. 4th Dep't 1987).

[21] 134 A.D. 2d at 847, 521 N.Y.S.2d at 594.

[22] 2000 Conn. Super. LEXIS 1823 (New Haven Dist. 2000) (Unrept.).

[23] *Id.* at *7.

[24] *Id.* at *9.

[25] 185 Ga. App. 574, 365 S.E.2d 125 (1988).

[26] 185 Ga. App. at 576, 365 S.E.2d at 127 (emphasis supplied).

[27] *Id.*

[28] 123 N.J. 308, 587 A.2d 260 (1991).

[29] 123 N.J. at 324, 587 A.2d at 268 (internal quotation marks omitted). The owners' property was used as a horse farm and was improved with a residence and out-buildings and fence-enclosed training areas. *Id*.

[30] 123 N.J. at 325, 587 A.2d at 268.

[31] *Id.* (citation omitted).

In 2006 in *Michigan Department of Transportation v. Tomkins,*[32] this very issue was addressed — whether in a case involving a partial taking there must be proof of special damage to the remainder before there may be a recovery for noise damage to the remainder. According to the Michigan Court of Appeals, proof of special damage to the remainder is not required in a case involving a physical taking of property. As will be discussed, however, in 2008 the Supreme Court of Michigan reversed the Michigan Court of Appeals' decision. In *Tomkins*, in which the transportation department condemned a strip of the owners' land abutting a road in connection with a new highway, the owners sought additional damages for "the highway effects," including "dust, dirt, noise, vibration, and smell."[33] In deciding the case, the Michigan Court of Appeals and later the Michigan Supreme Court had to determine the constitutionality of Section 20(2) of the Uniform Condemnation Procedures Act (UCPA),[34] Michigan Compiled Laws (MCL) 213.70(2), which excluded the general effects of a public project in calculating just compensation. Thus, as the Michigan Court of Appeals stated, the court was "faced with determining whether Section 20(2) is impermissibly in conflict with constitutional just compensation principles."[35] The transportation department relied on *Spiek v. Michigan Department of Transportation.*[36] In *Spiek*, the Supreme Court of Michigan had

> held that the property owners had no constitutional right to compensation for loss in their property values caused by the noise, dust, vibration, and fumes from the new freeway, because to receive just compensation for project effects, the owner must show that the damages are unique, special, peculiar, or in some way different in kind or character from the effects incurred by all property owners who reside next to busy highways and roads.[37]

The Michigan Court of Appeals in *Tomkins*, however, distinguished the *Spiek* case on the basis that it was an inverse condemnation case and that the court in *Spiek* had "carefully limited application of this rule to inverse condemnation cases where there had been no direct or physical invasion of the landowner's property."[38] The court held "the *Spiek* ruling is not binding on condemnation cases involving partial takings."[39] Thus, "the Spiek ruling does not require that a landowner who suffers severance damages from a partial taking demonstrate damages to the remaining land that are special or 'different in kind' from those suffered by other nearby landowners."[40] The court held that UCPA Section 20(2) "as applied to partial taking cases, impermissibly conflicts with the established constitutional meaning of 'just compensation'…."[41]

As stated, the Supreme Court of Michigan reversed.[42] The court concluded "that the presumption of the constitutionality of MCL 213.70(2) had not been overcome" and that "the circuit court properly relied on the state statute to exclude evidence of 'general effects' damages…."[43] First with respect to the appellate court's interpretation of *Spiek*, the Michigan Supreme Court disagreed with the Court of Appeals' conclusion that the rule in *Spiek* did not apply to partial takings.[44] Second, the court held that prior to 1963, the year the Michigan Constitution was adopted with the terms "just compensation" in Article 10, Section 2, the "case law does not suggest that 'general effects' damages were treated differently in an actual, partial taking and an inverse condemnation case."[45] Thus, general effects damages do not come within the meaning of just compensation. The Michigan Supreme Court reiterated "that those sophisticated in the law before 1963 understood that those

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[32] 270 Mich. App. 153, 715 N.W.2d 363 (2006), *rev'd and remanded*, 2008 Mich. LEXIS 1162 (Mich., June 11, 2008).

[33] 270 Mich. App. at 155, 715 N.W.2d at 367.

[34] MCL 213.51 *et seq*.

[35] 270 Mich. App. at 161, 715 N.W.2d at 370.

[36] 456 Mich. 331, 572 N.W.2d 201 (1988).

[37] DOT v. Tomkins, 270 Mich. App. at 162, 715 N.W.2d at 370.

[38] *Id.* at 162, 715 N.W.2d at 370–71.

[39] *Id.*

[40] *Id.*

[41] 270 Mich. App. at 165, 715 N.W.2d at 372 (*citing* Ark. Hwy. Comm'n v Kesner, 239 Ark. 270, 277, 388 S.W.2d 905 (Ark. 1965); La Plata Elec. Ass'n, Inc. v. Cummins, 728 P.2d 696, 700 (Colo. 1986) (stating that "the general damage/special damage distinction has no validity…when reduction in property value results from a taking of a portion of the land held by the property owner"); Commnw. of Ky., Dep't of Hwys. v. Curtis, 385 S.W.2d 48, 51 (Ky. App. 1964) ("[A] reduction in the value of residential property as a consequence of a highway's being brought in close proximity to it may be considered as an element of condemnation damages."); Mo. P. R. Co. v Nicholson, 460 So. 2d 615, 627 (La. App. 1984) ("Aesthetic considerations, unsightliness of the particular project, excessive noise, an inherent fear of living in close proximity to the particular project, in conjunction with other proven factors, …can support an award for severance damages, if these factors serve to reduce the value of the remainder of the property."); City of Crookston v. Erickson, 244 Minn. 321, 325, 69 N.W.2d 909 (Minn. 1955) (stating that where there is a partial taking, "[i]t is sufficient that the damage is shown to have been caused by the taking of part of [the] property even though it is damage of a type suffered by the public as a whole"); New Jersey v. Bd. of Educ. of the City of Elizabeth, 116 N.J. Super. 305, 314, 282 A.2d 71 (N.J. Super. Ct. Law Div. 1971) (stating that where there are damages to the remainder when part of a tract is physically appropriated, "it matters not that the injury is suffered in common with the general public"); State Highway Comm'n v. Bloom, 77 S.D. 452, 461, 93 N.W.2d 572 (S.D. 1958) ("Where a part of an owner's parcel or tract of land is taken for a public improvement such as a public highway, the owner is entitled to be compensated for the part taken and for consequential damage to the part not taken, even though the consequential damage is of a kind suffered by the public in common."); and Yakima v. Dahlin, 5 Wash. App. 129, 131–32, 485 P.2d 628 (1971).

[42] Mich. Dep't of Transp. v. Tomkins, 2008 Mich. LEXIS 1162, at *1 (June 11, 2008).

[43] *Id*. at *3.

[44] *Id*. at *31.

[45] *Id.* at *30.

'general effects' of a taking felt by the public are not compensable in a partial taking."[46]

In general, whether there is proof of noise damage requiring compensation depends on the property and the circumstances. Even increased noise near a park may not be compensable. For example, in *Florida, Department of Transportation v. West Palm Beach Garden Club*,[47] a judgment of $1.7 million for the municipal owner was reversed.[48] Not until the municipality amended its answer did the city assert for the first time that the department's taking would require the construction of a barrier to reduce sound, vibration, and light from the highway.[49] The court, finding that it was unlikely that the property would ever be used for anything other than a park, held that there was no evidence that the park "is no longer beneficially useful as a park because of the noise increase"[50] and that the traffic on I-95 did not affect the park anymore than it affected "tens of thousands of Florida residences…."[51] The court distinguished the decision in *Dennison v. State,*[52] *supra,* in which the court emphasized a park's seclusion and its "sylvan beauty" from the park in question that was located in close proximity to "a screaming jet path for a major airport…."[53]

Although the court did not refer to the general versus special damage rule, the court's opinion suggests that the court was applying a similar type of analysis, because the action did involve a partial taking and alleged damage to the remainder caused by noise, but the court found that the park was affected no more than other properties along I-95. Also implicit in the case is that the increased noise did not reduce the highest and best use of the property, *i.e*., its use as a park. On the other hand, as discussed next, if the owner shows that increased noise will reduce the highest and best use of the property then noise damages may be recoverable.

A.2. Compensation for Noise Damage Absent a Partial Taking

A.2.a. Whether the General Versus Special Damage Rule Applies

As seen, a physical taking is not required for a landowner to have a claim for damages for highway traffic noise.[54] However, where there is no physical taking of property, the owner may have to show that the noise of which he or she complains is different in kind from that suffered by the general public.

In a case from the State of Washington, the court applied the special damage rule and found that there was special damage to the subject property. No land, however, was taken from the owner in connection with the city's proposed construction of an overpass with a solid concrete wall 20 ft in height approximately 15 ft from the plaintiff's warehouse and office.[55] The inverse condemnation action alleged that the sound of traffic moving within 1 and 1/2 ft of the building would cause a build up of noise reverberating against the concrete wall that would be "intolerable" and render the office area unusable.[56] The appellate court agreed with the trial court's ruling that allowed the jury to consider noise damages. The appellate court stated:

> The instant case does not involve a physical taking of respondent's property. This fact does not prevent an award for damages…. *Generally, compensation is not allowed in such circumstances where the injury or damage is one suffered in common with the general public.* On the other hand, where the injury or damage is special or peculiar to the particular property involved and not such as is common to all the property in the neighborhood, compensation may be allowed….[57]

> We believe the ramp to be constructed in this case may create an echo chamber for one-way traffic immediately adjacent to the south end of respondent's warehouse and may thereby materially affect the fair market value of respondent's property. *This is a special damage differing in kind from the damage sustained by other properties due to the improvement in question.* In this situation the jury may consider noise as a factor.[58]

In *Felts v. Harris County, Texas,*[59] the court rejected the county's argument that there could be no constitutional damages to property unless "the government makes a physical appropriation, denies access to the property, or denies a permit for development."[60] When selling their house, the owners, who alleged in an inverse condemnation case that noise from the highway had damaged their property,[61] disclosed the proposed four-lane "major thoroughfare" highway project that would be adjacent their property line. The owners eventually sold the house for about $40,000 less than the original asking price.[62] Although a jury verdict was returned for the owners, the court of appeals reversed and the Supreme Court of Texas affirmed a judgment for the county.[63] In addressing the owners' claim, the court stated that injuries to property sustained in common

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[46] *Id.* at *37.

[47] 352 So. 2d 1177 (Fla. App. 4th Dist. 1977).

[48] *Id.* at 1178.

[49] *Id.* at 1179.

[50] *Id.* at 1180–81.

[51] *Id.* at 1181.

[52] 48 Misc. 2d 778, 265 N.Y.S.2d 671 (Ct. Cl. 1965), *aff'd* 22 N.Y.2d 409, 265 N.Y.S.2d 68, 239 N.E.2d 708 (N.Y. 1968).

[53] Fla. DOT v. West Palm Beach Garden Club, 352 So. 2d at 1181.

[54] Felts v. Harris County, Texas, 915 S.W.2d 482, 484 (Tex. 1996).

[55] City of Yakima v. Dahlin, 5 Wash. App. 129, 485 P.2d 628 (Wash. Ct. App. 1971).

[56] 5 Wash. App. at 131, 485 P.2d at 630.

[57] *Id.* (citation omitted, emphases supplied).

[58] 5 Wash. App. at 133, 485 P.2d at 630 (emphasis supplied).

[59] 915 S.W.2d 482 (Tex. 1996).

[60] *Id.* at 484.

[61] *Id.* at 483.

[62] *Id.*

[63] *Id.* at 484.

with the "community in which the property is situated…[that] are not connected with the landowner's use and enjoyment of property" are not compensable.[64] The court held that the owners' property would not experience noise any different from that experienced by their neighbors.[65] Moreover, "[t]he fact that some damages may be greater if the property is in closer proximity to the roadway does not suffice to render such damages constitutionally compensable…."[66]

A.2.b. Whether a Total or Substantial Deprivation of Use of the Property Is Required

With respect to a claim for noise damages, depending on the jurisdiction, it may be held in a case that does not involve a partial taking of the owner's property that the owner must demonstrate a deprivation of all, or substantially all, of his or her beneficial use of the property instead of special damage caused by noise to the property. For example, in 2005 a claim for damages for noise and vibrations caused by changes to a railroad track near the plaintiff's business was rejected in *Suchon v. Wisconsin Central Ltd*.[67] The court held that

> Wisconsin law does not recognize "mere consequential damage to property resulting from governmental action…." An actionable taking requires either an actual physical occupation by the condemning authority or a restriction on the use of the property that "deprives the owner of all, or substantially all of the beneficial use of his property."
>
> Plaintiff does not deny that it is his burden to show that he has been deprived of all or substantially all of the beneficial use of his property. He argues that this is exactly what he has suffered because, he alleges, customers and suppliers are frequently cut off from access to his building when trains block the railroad crossings, visitors to his business feel as if they are experiencing an earthquake when a train goes by and his shop is exposed to dust, fumes and debris thrown up by passing trains. Although the dust, inconvenience and noise are unpleasant impediments to the shop's operation, they fall far short of a taking…. Plaintiff can continue his operations by taking precautions such as painting vehicles inside and mixing paint when trains are not passing by.[68]

It is not clear that other jurisdictions require such a showing of a complete or substantial deprivation of use of the subject property. In *Knight v. City of Billings,*[69] after the city widened a street conditions changed dramatically, including an increase in "noise from passing traffic [that was] so loud that front doors must be closed for conversation to be heard inside."[70] Although the city argued that it did not "create the business growth" that caused the noise but merely adapted the street to it,[71] the Supreme Court of Montana disagreed. The court observed that a similar argument could be used with respect to larger airports and noise from aircraft, "[y]et the cases recognize that inverse condemnation has occurred…."[72] One of the issues for the court arose from the fact that property owners on the other side of the street "were compensated either in eminent domain proceedings, or by agreement with the city."[73] The court held that "under the unique facts of this case" there had been a taking but "caution[ed] that this holding is limited to the situation here, where a physical taking across the street occurred."[74]

In another Montana case, after the completion of a bridge there was an "immediate" increase in traffic noise.[75] The Supreme Court of Montana stated that it

> [s]ympathize[d] with the plight of the Landowners. However, the wheels of progress shall not be slowed. There is no doubt that increased traffic volume, traffic fumes, noise, dust and difficulty of ingress and egress caused inconvenience or discomfort to the property owners when the Reserve Street Bridge was opened. Nonetheless, we find these detriments to be noncompensable.[76]

In *Butler v. Gwinnett County,*[77] after a condemnation of the owners' property the owners filed suit 2 years later in inverse condemnation alleging that a taking caused by "negligent construction of the access lane damaged their remaining property by causing noise, pollution, erosion and other problems."[78] The court recognized that "[d]amages caused by negligent or improper construction on condemned property…are recov-

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[64] *Id.* at 485 (*citing* TEX. PROP. CODE § 21.042(d); State v. Schmidt, 867 S.W.2d 769, 779–81 (Tex. 1993); State v. Carpenter, 126 Tex. 604, 89 S.W.2d 194, 201 (1936); Gainesville, H. & W. R.R. v. Hall, 78 Tex. 169, 14 S.W. 259 (1890); Texarkana & N.W. R.R. v. Goldberg, 68 Tex. 685, 5 S.W. 824, 826 (1887)).

[65] *Id.*

[66] *Id.* (*citing Schmidt*, 867 S.W.2d at 781; NICHOLS ON EMINENT DOMAIN § 6.08[2], at 6-130–6-132 (3d ed. rev. 1994) ("If the damage suffered is of a type similar to that suffered by the public in general or by other neighboring landowners, even if different in degree, …no compensation is required regardless of the severity of the injury sustained.")).

[67] 2005 U.S. Dist. LEXIS 4343 (W.D. Wis. 2005).

[68] *Id.* at *6–7 (emphasis supplied) (*quoting* Howell Plaza, Inc. v. State Highway Comm'n, 66 Wis. 2d 720, 725, 226 N.W.2d 185, 188 (1975) (observing that a taking requires more than impairment of value of farm from noxious odors from municipal sewerage disposal plant, or partial obstruction of ingress to and egress from plaintiff's property or obstruction of view from property)).

[69] 197 Mont. 165, 642 P.2d 141 (1982).

[70] 197 Mont. at 169, 642 P.2d at 143.

[71] 197 Mont. at 171, 642 P.2d at 144.

[72] *Id.* (citation omitted).

[73] 197 Mont. at 173, 642 P.2d at 145.

[74] 197 Mont. at 174, 642 P.2d at 146.

[75] Adams v. Dep't of Highways of Montana*,* 230 Mont. 393, 753 P.2d 846 (1988).

[76] 230 Mont. at 401, 753 P.2d at 851. The court stated that "while a reduction in property values may result from the noise, light, vibration, or fumes produced by the proximity of increased vehicular traffic on a newly constructed highway, such consequential damage is not usually treated as 'damage' in the constitutional sense." 230 Mont. at 403, 753 P.2d at 852.

[77] 223 Ga. App. 703, 479 S.E.2d 11 (1996), *cert. denied*, 1997 Ga. LEXIS 335.

[78] 223 Ga. App. at 704, 479 S.E.2d at 12–13.

erable in a suit separate from the condemnation proceeding."[79] In this case the owners' own expert conceded that the damages were the result of "the overall manner in which the County chose to design and use the improvement."[80] The court ruled that there was no taking caused by negligent construction and that "[f]rom a policy perspective, allowing this claim to proceed will permit unending inverse condemnation and damage claims from property owners who decide, after construction, that the improvement's design impacts them in a way they did not anticipate."[81]

A.2.c. Compensation for Temporary Increase in Noise

Temporary inconveniences caused by "noise, dust, increased traffic, and other inconveniences incident to the building of a highway" are not compensable."[82] However, there may be evidence of special damage to property caused by noise that is peculiar to the owner's property.

In *Hillman v. Department of Transportation,*[83] a case involving easements that were taken for construction for a 13-month period for road work, the court rejected the transportation department's claim that any compensation for noise damages was barred by the "temporary inconvenience rule" as stated in two earlier Georgia cases, *State Highway Department v. Hollywood Baptist Church of Rome*[84] and *Department of Transportation v. Dent.*[85] In *Hillman* the Supreme Court of Georgia determined that

> the only proper distinction to be made in cases of temporary takings is the same requirement in force for permanent takings. That is that the consequential damages must be special to the condemnee and not be those suffered by the public in general.[86]
>
> *[T]he fact that the property taken is an easement and is held by the public only temporarily does not authorize the condemning body to impose special damages which diminish the value of the land not taken.* If the taking of a temporary easement can be shown by competent evidence to have diminished the fair market value of the land not taken, the owner is entitled to just and adequate compensation.[87]

Thus, the *Hillman* court held that the owner was entitled to show that the "construction easement caused some special damage to his remaining property, other than the general inconvenience, noise, dust and obstruction of the construction process…."[88]

B. COMPENSATION FOR NOISE DAMAGE FROM AIRCRAFT

B.1. United States v. Causby and Its Progeny

As one authority states,

> [o]wners of property near a government-owned airport may have a cause of action for an unconstitutional *de facto* taking because of noise and vibration caused by overflights of jet aircraft landing and taking off, and this [fact] is true even though their property was purchased after the beginning of these conditions.[89]

There are numerous cases involving airport noise in which some property owners recovered compensation for a taking of their property caused by aircraft noise. Although there is some authority holding that for ground or flight operations to constitute a taking or damaging of property, there must be a physical invasion of the property,[90] the U.S. Supreme Court and other courts do not require a direct, physical invasion of the property.[91]

The seminal case in this area is *United States v. Causby.*[92] In *Causby*, the respondents owned 28 acres near an airport outside Greensboro, North Carolina; the owners used the property principally for raising chickens.[93] The United States had leased the nearby airport for the use of military aircraft, including bombers, transports, and fighters.[94] The glide-path for one runway as approved at the time by the Civil Aeronautics Authority resulted in planes passing over the property's

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[79] *Id.* (citation omitted).

[80] *Id.*

[81] 223 Ga. App. at 705, 479 S.E.2d at 13.

[82] Felix v. Harris County, 915 S.W.2d at 485 (*citing* Texas v. Biggar, 873 S.W.2d 11, 14 (Tex. 1994); Texas v. Schmidt, 37 Tex. Sup. J. 47, 867 S.W.2d 769, 775 (1993); City of Austin v. Avenue Corp., 704 S.W.2d 11, 12 (Tex. 1986); L-M-S Inc. v. Blackwell, 149 Tex. 348, 233 S.W.2d 286, 289 (Tex. 1950)).

[83] 257 Ga. 338, 359 S.E.2d 637 (1987).

[84] 112 Ga. App. 857, 146 S.E.2d 570 (1965).

[85] 142 Ga. App. 94, 235 S.E.2d 610 (1977).

[86] 257 Ga. at 339, 359 S.E.2d at 639.

[87] 257 Ga. at 340, 359 S.E.2d at 640 (emphasis supplied).

[88] *Id.* (citation omitted).

[89] 51 N.Y. JUR. 2d *Eminent Domain* § 103 (*citing* Cunliffe v. Monroe County, 63 Misc. 2d 62, 312 N.Y.S.2d 879 (N.Y. Sup. 1970) (holding that flights had not rendered the property substantially uninhabitable). *See also* 3775 Genesee St. Inc. v. State, 99 Misc. 2d 59, 415 N.Y.S.2d 575 (Ct. Cl. 1979) (claim dismissed). *See also* Annotation, *Airport Operations or Flight of Aircraft as Constituting Taking or Damaging of Property*, 22 A.L.R. 4th 863 (2008 Supp.); Young v. Palm Beach County, 443 So. 2d 450 (Fla. App. 4th Dist. 1984) (cause of action stated in inverse condemnation)).

[90] 22 A.L.R. 4th 863, § 3 (*citing, e.g.,* Breneman v. United States, 57 Fed. Cl. 571 (2003) [*aff'd*, 2004 U.S. App. LEXIS 9987 (Fed. Cir. 2004)]; City of Austin v. Travis County Landfill Co., LLC, 73 S.W.3d 234 (Tex. 2002) *reh'g overruled* (May 30, 2002)).

[91] *Id*. § 4 (*citing, e.g.,* Garamella v. City of Bridgeport, 63 F. Supp. 2d 198 (D. Conn. 1999); Walsh v. Avalon Aviation, Inc., 118 F. Supp. 2d 675 (D. Md. 2000); *but see Hero Lands Co. v. United States*, 1 Cl. Ct. 102, 554 F. Supp. 1263 (1983), *aff'd*, 727 F.2d 1118 (Fed. Cir. 1983)).

[92] 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946) (*superseded by statute as stated in, distinguished by, cited in dissenting opinion,* McCarran Int'l Airport v. Sisolak, 137 P.3d 1110 (Nev. 2006)).

[93] 328 U.S. at 260, 66 S. Ct. at 1064, 90 L. Ed. at 1208.

[94] 328 U.S. at 259, 66 S. Ct. at 1064, 90 L. Ed. at 1209.

house and barn at distances of 67 ft above the house and 63 ft above the barn.[95] Because the frequent, low-flying military operations were conducted within the "navigable air space of the United States," over which the United States had complete sovereignty, and were "within the minimum safe altitudes of flight which had been prescribed, they were an exercise of the declared right of travel through the airspace."[96] Nevertheless, there was a taking of the landowners' property.

Although there had been no physical invasion or taking of the property,[97] the United States conceded at oral argument that "if the flights over respondents' property rendered it uninhabitable, there would be a taking compensable under the Fifth Amendment."[98] However, in *Causby* the government defended against the landowners' claim on the basis of federal law[99] that provided that "the United States has 'complete and exclusive national sovereignty in the air space' over this country."[100] Thus, according to the government, there was no taking because

> these flights were within the minimum safe altitudes of flight which had been prescribed, [and] they were an exercise of the declared right of travel through the airspace. The United States concludes … that at most there was merely incidental damage occurring as a consequence of authorized air navigation. It also argues that the landowner does not own superadjacent airspace which he has not subjected to possession by the erection of structures or other occupancy.[101]

The Court reasoned, however, that

> [i]f, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it.[102]
>
> [T]he line of flight is over the land. And the land is appropriated as directly and completely as if it were used for the runways themselves.[103]

Moreover, the fact that the glide-path was approved by a federal agency did not matter. "The path of glide governs the method of operating—of landing or taking off. The altitude required for that operation is not the minimum safe altitude of flight which is the downward reach of the navigable airspace."[104]

The Supreme Court observed that "[i]t is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—*Cujus est solum ejus est usque ad coelum*."[105] However, "that doctrine has no place in the modern world."[106]

> The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.[107]

Nevertheless, the Court held that "if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere…. The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land."[108] Furthermore, "[t]he fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material…. [T]he flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it."[109]

The Court referred to an earlier case in which the Court had held that the continual firing of artillery over the owner's land warranted a finding that a servitude had been imposed in favor of the United States, giving rise to the petitioner's right to compensation.[110] The Court held that

> [t]he path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value.[111]

The Court ruled that the frequent overflights at such low altitude constituted a taking of the property, the same as if the "United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly…."[112] However, the Court held that "[f]lights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of

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[95] 328 U.S. at 258, 66 S. Ct. at 1064, 90 L. Ed. at 1208.

[96] 328 U.S. at 260, 66 S. Ct. at 1065, 90 L. Ed. at 1209–10.

[97] 328 U.S. at 260, 66 S. Ct. at 1065, 90 L. Ed. at 1210.

[98] 328 U.S. at 261, 66 S. Ct. at 1065, 90 L. Ed. at 1210.

[99] Air Commerce Act of 1926, 44 Stat. 568, 49 U S.C. § 171, as amended by the Civil Aeronautics Act of 1938, 52 Stat. 973 [*Superseded*]. *See* 49 U.S.C. § 40102(a)(30) (2006) ("'[N]avigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part, including airspace needed to ensure safety in the takeoff and landing of aircraft."); *see* 49 U.S.C. § 40103(a) (2006) (declaring sovereignty and public right of transit).

[100] 328 U.S. at 260, 66 S. Ct. at 1065, 90 L. Ed. at 1209 (*citing* 49 U.S.C. § 176(a)).

[101] 328 U.S. at 260, 66 S. Ct. at 1065, 90 L. Ed. at 1210.

[102] 328 U.S. at 261, 66 S. Ct. at 1066, 90 L. Ed. at 1210 (footnote omitted).

[103] 328 U.S. at 262, 66 S. Ct. at 1066, 90 L. Ed. at 1211.

[104] 328 U.S. at 263, 66 S. Ct. at 1067, 90 L. Ed. at 1211.

[105] 328 U.S. at 260–61, 66 S. Ct. at 1065, 90 L. Ed. at 1210.

[106] *Id*.

[107] *Id.*

[108] 328 U.S. at 264, 66 S. Ct. at 1067, 90 L. Ed. at 1212.

[109] *Id.*

[110] Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 43 S. Ct. 135, 67 L. Ed. 287 (1922).

[111] United States v. Causby, 328 U.S. at 262, 66 S. Ct. at 1066, 90 L. Ed. at 1211.

[112] 328 U.S. at 264–65, 66 S. Ct. at 1067, 90 L. Ed. at 1212.

the land."[113] Because it was not clear on the record whether the taking was a temporary or permanent one, the Court remanded the case to the Court of Claims.[114]

Fourteen years after *Causby*, the Supreme Court of the State of Washington in *Ackerman v. Port of Seattle*[115] had occasion to apply the *Causby* rule to takeoffs and landings over open and unoccupied land. The question presented was whether such takeoffs and landings at the newly opened Seattle-Tacoma International Airport constituted a taking in violation of the State Constitution, and, if so, who must pay the compensation, the governmental entity operating the airport, or others.

A key issue in *Ackerman* was the interpretation of what is navigable airspace under the Civil Aeronautics Act.[116] The Port argued that "Congress has made the 'airspace' a public highway, and, therefore, appellants have never owned any rights in the airspace which could be subject to a governmental taking."[117] The court, however, disagreed and followed *Causby*. The court held that

> [i]n landing and taking off, a plane necessarily flies a few feet, even a few inches, above the ground for some instants. Whether this occurs over airport property or over private property depends upon the size and type of the plane, as well as the size of the airport and the length of the particular runway. We do not believe that the Civil Aeronautics Act is to be interpreted as allowing the civil aeronautics board to place such flights over private property within the public domain. Such an interpretation would be a strained and unnatural construction of the language of the act. Congress has defined *navigable airspace* (*public domain*) only in terms of minimum safe altitudes of flight; this definition has not been changed since the *Causby* case, *supra*. "Thus, it is apparent that the path of glide" used by planes in landing and taking off from airports "is not the minimum safe altitude of flight within the meaning of the statute."[118]

The court held that the overflights constituted a taking of an air easement over the owners' land.[119] Equally important, the *Ackerman* decision established that the Port was liable for the taking.[120] The court held that

> [h]aving the power to acquire an approach way by condemnation, the Port, allegedly, failed to exercise that power, with the result that the appellants' private airspace is allegedly being used as an approach way, without just compensation first having been paid to them. Clearly, an adequate approach way is as necessary a part of an airport as is the ground on which the airstrip, itself, is constructed, if the private airspace of adjacent landowners is not to be invaded by airplanes using the airport. The taking of an approach way is thus reasonably necessary to the maintenance and operation of the airstrip. "The taking or damaging of land to the extent reasonably necessary to the *maintenance and operation of other property devoted to a public use*, is a taking or damaging for a public use and subject to the provisions of Art. I, § 16 (amendment 9) of the state constitution."[121]

In 1999 in *Melillo v. City of New Haven,*[122] the Supreme Court of Connecticut followed the holding in *Causby*. In *Melillo* the homeowners' property was located several hundred ft from the Tweed-New Haven Airport and less than 1500 ft from the end of the runway.[123] Between 1975 and 1984 there was no commercial jet service but Air Wisconsin began such service in 1985.[124] A substantial number of jets flew over the owners' home, frequently at less than 100 ft above the ground.[125] Although the trial court held that earlier commercial jet traffic from 1967 to 1975 had resulted in a taking for constitutional purposes, the owners had not acquired the property until 1979.[126] Although the "earlier, permanent taking did not automatically bar the plaintiffs from establishing a second compensable taking by virtue of the Air Wisconsin flights,"[127] the plaintiffs failed to prove that there was another taking "to an even greater extent by the substantially more severe [Air Wisconsin] overflights from 1984 to 1986," at least according to the trial court.[128] On this issue the Supreme Court of Connecticut held that the plaintiffs' evidence below was sufficient to show that there was a substantial interference with the owners' enjoyment of the property. Nevertheless, the court agreed that because the owners' expert was not credible there was no proof of a "*compensable* taking."[129]

In finding for the defendant the court stated that

> "[t]he answer to the question of when a takings claim has accrued requires the court to consider each element as it relates to the unique facts of a particular case…. Avigation easement claims cannot be tried on a 'one size fits all' formula. Each element must be established for each parcel, and evidence of a taking over one parcel in a case does not, without more, support a finding of a taking over other parcels…."[130]

Thus, there is a right on the part of landowners to have peaceable enjoyment of the property from airports, but, as discussed below, whether a landowner has a right to compensation depends on the facts of each case.

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[113] 328 U.S. at 266, 66 S. Ct. at 1068, 90 L. Ed. at 1213.

[114] 328 U.S. at 268, 66 S. Ct. at 1069, 90 L. Ed. at 1214.

[115] 55 Wash. 2d 400, 348 P.2d 664 (1960).

[116] 49 U.S.C.A. § 401 *et seq.* [*superseded*; *see* note 98, *supra*.]

[117] 55 Wash. 2d at 409, 348 P.2d at 669.

[118] 55 Wash. 2d at 412, 348 P.2d at 671 (citation omitted).

[119] *Id.*

[120] 55 Wash. 2d at 413, 348 P.2d at 671.

[121] 55 Wash. 2d at 413, 348 P.2d at 671–72 (emphasis in original).

[122] 249 Conn. 138, 732 A.2d 133 (1999).

[123] *Id.* at 140, 732 A.2d at 135.

[124] 249 Conn. at 141, 732 A.2d at 136.

[125] *Id.*

[126] 249 Conn. at 145, 732 A.2d at 138.

[127] 249 Conn. at 146, 732 A.2d at 138.

[128] 249 Conn. at 146, 732 A.2d at 139 (internal quotation marks omitted).

[129] 249 Conn. at 150, 732 A.2d at 141 (emphasis in original).

[130] 249 Conn. at 149, 732 A.2d at 140 (*quoting* Persyn v. United States, 34 Fed. Cl. 187, 196 (1995)).

B.2. Compensation Regardless of Whether Flights Are Above or Below Minimum Safe Altitudes

In several cases the courts have considered whether a property owner had established that a taking of property had occurred because of noise caused by overflights of aircraft. Although navigable airspace, that is, airspace that is regulated by the Federal Aviation Administration (FAA), has been defined as that airspace that is 500 ft above ground level in noncongested areas and 1,000 ft above ground level in congested areas, such a rule does not preclude a landowner from having a claim for noise damages above or below those altitudes.[131] As held in *Branning v. United States*,[132] "it is clear that the Government's liability for a taking is not precluded merely because the flights of Government aircraft are in what Congress has declared to be navigable airspace and subject to its regulation." As held later in *Argent v. United States,*[133] the government may be required to pay compensation for a taking caused by noise damages at altitudes above 500 or 1,000 ft, notwithstanding the law on what constitutes navigable airspace that is in the public domain. When airplanes are at altitudes at less than 500 ft for takeoffs and landings at government airports, the landowner may have a claim for compensation because the landowner has a property right to useable airspace below 500 ft.[134]

In *Argent v. United States, supra,* the owners of 46 parcels of land surrounding the Naval Air Station at Whidbey Island, Washington, sued in inverse condemnation because of aircraft noise at an airstrip used by the Navy to simulate landings on aircraft carriers at sea. The court noted that since *Causby* "federal courts have repeatedly confirmed that the United States may convert private property to public use by its operation of aircraft."[135] The court observed that there are cases holding "that the United States might be liable for flights below 500 feet in noncongested areas (or 1000 feet in congested areas), but that flights at higher altitudes did not interfere with the landowner's use of the surface."[136]

The court held, however, that there is no such *per se* or mechanical rule: "while the facts, reasoning, and rules of *Causby* have always guided this corner of takings law, they do not imprison it."[137] If the plaintiffs "allege a peculiar burden," then the plaintiffs have stated a claim.[138] Thus, the court held that "where, as here, plaintiffs complain of a peculiarly burdensome pattern of activity, including both intrusive and non-intrusive flights, that significantly impairs their use and enjoyment of their land, those plaintiffs may state a cause of action."[139] Although certain claims prior to 1986 were barred because the case was filed in 1992, and a claim must be filed against the United States for a taking within 6 years of the date the claim arose,[140] the court held:

> "The taking of an avigation easement by the Government occurs when the Government begins to operate aircraft regularly and frequently over a parcel of land at low altitudes, with the intention of continuing such flights indefinitely…." The United States may effect a second taking by, inter alia, increasing the number of flights…or introducing noisier aircraft…."[141]

The court found that "the plaintiffs may be able to show that the Navy sufficiently increased the scope of its easement in the years after 1986" so as to entitle them to a recovery.[142]

These issues were visited recently with different outcomes by the Indiana Court of Appeals and the Supreme Court of Indiana. The question was whether a compensable taking occurred when a neighborhood was affected by noise from overflights of aircraft. In *Biddle v. BAA Indianapolis, LLC,*[143] the Indiana Court of Appeals considered a homeowners' appeal of the trial court's grant of a summary judgment in favor of the defendant.[144] The airport in question had constructed a new runway on a location nearly identical to the one proposed in an earlier master plan for the airport.[145] Arriving aircraft passed over the owners' property at distances of approximately 1,300 to 1,500 ft above the ground; departing aircraft from the runway passed over the neighborhood at distances of 2,000 to 4,800 ft, apparently 24 hours a day.[146] The defendants argued that

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[131] *See* 14 C.F.R. § 91.119 (2005).

[132] 228 Ct. Cl. 240, 257, 654 F.2d 88, 99 (1981).

[133] 124 F.3d 1277 (Fed. Cir. 1997).

[134] McCarran Int'l Airport v. Sisolak, 137 P.3d 1110, 1119 (Nev. 2006).

[135] 124 F.3d at 1281.

[136] *Id.* (*citing* Lacey v. United States, 219 Ct. Cl. 551, 595 F.2d 614, 616 (1979) (treating 500 ft as line of demarcation between compensable and noncompensable over-flights); Aaron v. United States, 160 Ct. Cl. 295, 311 F.2d 798, 801 (1963) (allowing claims based on flights below 500 ft, while denying those based on flights over 500 ft); Matson v. United States, 145 Ct. Cl. 225, 171 F. Supp. 283, 286 (1959) (allowing recovery for flights under 500 ft)).

[137] 124 F.3d at 1282.

[138] *Id.* at 1283.

[139] *Id.* at 1284 (*citing* Griggs v. Allegheny County, 369 U.S. 84, 87, 82 S. Ct. 531, 7 L. Ed. 2d 585 (1962) (affirming that a taking occurred even though some of the activities of which the plaintiff complained were near, but not over, the plaintiff's property); Branning v. United States, 228 Ct. Cl. 240, 242, 654 F.2d 88, 90 (1981) (finding that the United States took private land without violating the landowner's airspace because its over-flights were "peculiarly burdensome" to the landowner)).

[140] *Id.* at 1285 (*citing* 28 U.S.C. § 2501).

[141] *Id.* (citations omitted).

[142] *Id.* at 1286.

[143] 830 N.E.2d 76 (Ind. App. 5th Dist. 2005), *aff'd in part, superseded in part*, 860 N.E.2d 570 (2007).

[144] *Id.* at 79. Although the appeals court affirmed in part the grant of summary judgment to appellees on the inverse condemnation claim, the summary judgment was reversed in part and remanded regarding whether the flights constituted a taking.

[145] *Id.*

[146] *Id.*

because the flights were above an altitude of 1,000 ft mandated for flights in congested areas, there was not a compensable taking of the owners' property.[147]

The Indiana Court of Appeals, however, relied on cases holding that even if aircraft are operating in navigable airspace above the minimum prescribed for safe flight, there still may be a taking.[148] The court reversed a summary judgment below, dismissing the owners' inverse condemnation claim:

> There can be no imaginary line above which flights cannot result in a taking and below which they may without some rational basis for the imposition of that boundary. It is conceivable that constant or even intermittent flights in the navigable airspace may interfere more in the use and enjoyment of property than the occasional flight below the navigable airspace. Landowners who feel that they are subject to a taking because of flights in the navigable airspace should have the opportunity to present their claims to a trier of fact and not have them dismissed because of an arbitrary rule which apparently was written with safety as its concern, not the legitimate and enjoyable use of property.[149]

Thus, the court held that a taking may occur based on overflights even though those flights above an owner's property occur in navigable airspace above 1,000 ft in congested areas.[150]

In *Biddle* the defendants argued that the plaintiffs could not show that they had suffered an injury special and peculiar to the owners' property in contrast to inconvenience suffered by the public generally.[151] However, the court defined "public" to mean "the entire public in general," i.e., all residents of Indianapolis.[152] "[B]y IAA's own admission, the overflights affect thousands of homeowners, a tiny fraction of the hundreds of thousands that live in the greater Indianapolis area."[153] The court held "that the injury suffered by the Homeowners is not suffered by the public generally but is special and peculiar to the Homeowners, who have chosen to file a claim against IAA, and others similarly situated who have not sought legal recourse."[154]

The Supreme Court of Indiana reversed.[155] First, the court held that "[w]hether a taking occurred can be subject to summary judgment" and that "appellate review of whether a taking occurred is proper."[156] Second, the court stated that it would follow the "great weight of Federal authority," holding that a taking occurs only when aircraft are present in the 'superjacent airspace' (meaning the air the owner reasonably occupies for his own use)."[157] Third, the court recognized the rule in Causby, *supra*, that noise from aircraft overflying a landowner's property may result in a taking of a permanent or temporary nature, "[e]ven though planes flew within navigable airspace" regulated by the FAA.[158] However, the Indiana Supreme Court relied on *Aaron v. United States,*[159] in which the U.S. Court of Claims "articulated a presumption based on navigable airspace boundaries. When an aircraft flies within the navigable airspace directly above private property, the court presumes there is no taking unless the effect on private property is 'so severe as to amount to a practical destruction or a substantial impairment of it.'"[160]

The court agreed that some of its "inverse condemnation cases have labeled the required degree of harm for takings a 'special' or 'peculiar' injury," but the court stated that the test did not "add much to the tasks of identifying takings." [161] The court adopted a rule combining the U.S. Supreme Court's "*Lingle* analysis"[162]

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[147] *Id.* at 83. The court cited 14 C.F.R. § 91.119 (2005), which states:

> Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
>
> (a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.
>
> (b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.
>
> (c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

[148] *Id*. (*citing* Aaron v. United States, 160 Ct. Cl. 295, 311 F.2d 798 (1963) (concluding that unavoidable damage could be so severe as to amount to a practical destruction or substantial impairment of the property even for flights exceeding 500 ft, the minimum altitude for flight in noncongested areas); Stephens v. United States, 11 Cl. Ct. 352, 362 (1986) (concluding as a general proposition that because the flights occurred at more than 1000 ft over congested areas, there was no taking but recognizing an exception in that "a presumption of nontaking…can be overcome by proof of destruction of, or substantial impairment to the property"); Thornburg v. Port of Portland, 233 Or. 178, 198, 376 P.2d 100, 109 (1962) (a "noise-nuisance" could amount to a taking because it was possible that the person could be ousted from the legitimate use of the property by aircraft flying above 500 ft)).

[149] *Id.* at 84.

[150] *Id.*

[151] *Id.* at 84–85.

[152] *Id.* at 85.

[153] *Id.*

[154] *Id.* (footnote omitted). One landowner's claim was precluded on the basis that the prior owner of the property had been compensated and the new owners had "accepted the home with the noise and all other effects of the airspace." *Id.* at 86. The defendant airport was a third-party beneficiary of the agreement between the current and prior owners of the property. *Id.*

[155] Biddle v. BAA Indianapolis, LLC, 860 N.E.2d 570 (2007).

[156] *Id.* at 575.

[157] *Id.* at 578 (*quoting* Branning v. United States, 228 Ct. Cl. 240, 654 F.2d 88, 99 (1981) (some internal quotation marks omitted).

[158] *Id.* at 579.

[159] 160 Ct. Cl. 295, 311 F.2d 798 (1963).

[160] Biddle v. BAA Indianapolis LLC, 860 N.E.2d at 579.

[161] *Id*. at 580.

[162] In describing Lingle v. Chevron USA, Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005), the Supreme Court

with the "Aaron presumption," which the court deemed to be "a more precise standard" for determining whether noise from overflights of aircraft results in a taking.[163] In reversing the Court of Appeals and agreeing with the trial court, the Indiana Supreme Court held that the

> [h]omeowners did not demonstrate injury sufficient to support an exception to the Aaron presumption. For one thing, the flight altitudes alleged are several times higher than the minimum navigable airspace. While the noise from aircraft flying between 1,300 and 4,800 feet above ground is no doubt considerable, the trial court was warranted in concluding that it does not amount to a "practical destruction" or "substantial impairment" of Homeowners' use of their properties. Homeowners still make many valuable uses of their properties in spite of the noise.[164]

In sum, the court agreed with the trial court that the aircraft noise had not resulted in a taking and that a summary judgment for the defendant was indeed proper.[165]

B.3. Liability for Noise Damages Based on Resumption of Flights or Increased Noise

The noise cases in recent years and claims of a taking without a physical taking of property have dealt with a variety of issues. As seen in the *Biddle* and *Argent* cases, *supra*, one issue that has arisen is whether the landowner has a claim for compensation for a later taking allegedly caused by an increase in noise because of additional overflights or an increase in noise as a result of the resumption of operations and resulting overflights of jet aircraft.

In *City of Austin v. Travis County Landfill Co. LLC,*[166] the court held that an increase in noise must be such that the property may no longer be used for its intended purpose. The Supreme Court of Texas reversed an appellate court's decision affirming a trial court's judgment for an amount exceeding $2.9 million for a taking caused by flight operations at Austin-Bergstrom International Airport (ABIA). The airport had opened in 1997 on the site of the former Bergstrom Air Force Base which had closed in 1991. A landfill owned a 133-acre tract of land about 1/2 mi from the airport's main runway.[167] The former owner of the property had granted an avigation easement allowing over 60,900 military aircraft flights over the property each year.[168] The new owner sued the city on the basis that the city's civilian flights constituted a taking of the landfill's property not authorized by the easement for military flights.[169]

The court held that the owner had to show that "the flights over private land [are]…'so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.'"[170] Moreover, the court, relying on a number of federal and state cases, held that the standard for a taking was that "the overflight-related effects must directly, immediately, and substantially impact the property's surface so that it is no longer useable for its intended purpose."[171]

The court reversed the judgment below because the jury was allowed to find on an alternate basis "that the overflights caused a decrease in the property's market

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of Indiana stated that "regulation effects a taking if it deprives an owner of all or substantially all economic or productive use of his or her property." 860 N.E.2d at 577.

[163] 860 N.E.2d at 580.

[164] *Id.*

[165] *Id.*

[166] 73 S.W.3d 234 (Tex. 2002).

[167] *Id.* at 237.

[168] *Id.*

[169] *Id.*

[170] *Id.* at 239 (*quoting Causby*, 328 U.S. at 266, 66 S. Ct. at 1068, 90 L. Ed. at 1213).

[171] *Id.* at 240 (*citing Causby*, 328 U.S. at 262, 66 S. Ct. at 1066–67, 90 L. Ed. at 1211 and Griggs v. Allegheny County, 369 U.S. 84, 87, 82 S. Ct. 531, 532, 7 L. Ed. 2d 585, 587 (1962) (holding that a taking occurred when civilian airplane overflights caused noise comparable to that of "a riveting machine or steam hammer," caused vibrations that separated plaster from the walls and ceilings, and caused residents to become nervous and distraught, making residential use impossible, and thus forcing claimants to move from their home); City of Houston v. McFadden, 420 S.W.2d 811, 814 (Tex. Civ. App. 14th Dist. 1967), *writ ref'd n.r.e.* (holding that there was a taking claim where evidence showed that aircraft over-flights caused blinding glare, intense noise that made communication impossible, jet sprays, and vibrations that broke windows and cracked walls); Melillo v. City of New Haven, 249 Conn. 138, 732 A.2d 133, 141 (Conn. 1999) (observing that the trial court's finding that noise and turbulence interfered with enjoyment of the property was enough to establish a taking under *Causby* and therefore under the Connecticut Constitution, but concluding that the plaintiffs were not entitled to compensation because they failed to show economic harm); Johnson v. City of Greeneville, 222 Tenn. 260, 435 S.W.2d 476, 478–80 (1968) (concluding that allegations that noise and vibrations from airplane over-flights caused physical distress and fear and interfered with the property's use stated a takings claim under the Tennessee Constitution); State v. City of Columbus, 3 Ohio St. 2d 154, 158, 209 N.E.2d 405, 408–09 (Ohio 1965) (holding that there was a taking under the Ohio Constitution when the evidence demonstrated that over-flights caused disruption of sleep and physical damage to walls and personal property); Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540, 540–42 (Wash. 1964) (holding that noise from airplanes' takeoff and landing can establish a taking under the Washington Constitution); Johnson v. Airport Auth. of Omaha, 173 Neb. 801, 115 N.W.2d 426, 434–35 (Neb. 1962) (affirming trial court's judgment in the property owner's favor in a condemnation case under the Nebraska and Federal Constitutions when the evidence showed that intense vibrations interfered with the property's use and enjoyment and caused fear); Hillsborough County Aviation Auth. v. Benitez, 200 So. 2d 194, 196, 199 (Fla. App. 2d Dist. 1967) (holding that under the Florida Constitution, a taking by over-flight occurred because conversations were impossible, television reception was disturbed, sleep was interrupted, fuel residue was deposited on property, and vibrations affected the residential structure)).

value…."[172] The Texas Supreme Court held that "the trial court incorrectly stated the law by equating a fair-market-value decline without a taking without considering the overflights' immediate and direct effects on the land's surface."[173] The court held that evidence of civilian overflights alone is not enough for there to be an unconstitutional taking.[174] The evidence, *inter alia*, "failed to show that civilian overflight effects caused or contributed to the land's market-value decline," and the decline in market-value by itself did "not establish a constitutional taking."[175] Furthermore, there was no evidence that the overflights "interfered with the use of TCLC's property as a landfill."[176]

C. COMPENSATION FOR WATER DAMAGES

C.1. Claims in Inverse Condemnation for Flooding Damages

If land is flooded because of a public project "the flooding is treated as a taking within the constitutional sense."[177] Flooding is a physical taking, not a regulatory taking.[178] Thus, " 'where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation….' Construction by the state which causes flooding on abutting private property may constitute a taking where the flooding is a 'permanent invasion' of land amounting to an appropriation."[179]

In an inverse condemnation case alleging flooding damages it has been held that a property owner does not have to show "that the governmental defendant deprived the plaintiff of all use and enjoyment of the property at issue," only that there was "[a] 'substantial interference' with the use and enjoyment of property…."[180] Although "a claim for inverse condemnation requires a showing that the governmental acts alleged to constitute a taking of private property were done with the intent to take the property for a public use,"[181] the government's intent may be inferred if "the natural and ordinary consequence of [the government's] action was the substantial interference with property rights."[182]

An inverse claim may be available to a property owner when there is intermittent but recurrent flooding of property.

> Whether occasional flooding is of such frequency, regularity, and permanency as to constitute a *taking* and not merely a temporary invasion for which the landowner should be left only to a possible recovery of damages is a question of degree, and each case must stand on its own peculiar facts…." *Flooding is permanent if it imposes "a servitude of indefinite duration," even if intermittent…. Thus, intermittent flooding may, under some circumstances, constitute a taking….*[183]

Even if a claim relates to a 100-year flood, there may be a permanent invasion of property resulting in a taking when highway structures forseeably increased the extent of flooding on an owner's property.[184]

> The frequency of the flooding is not, in itself, determinative of a taking. "There is no difference of kind, but only of degree, between a permanent condition of continual overflow…and a permanent liability to intermittent but inevitably recurring overflows…." The 100 year flood is, by statistical definition, an inevitably recurring event. Thus, if the structures causing the overflow are permanent, the overflow which occurs with the 100 year flood constitutes a permanent invasion.[185]

It has been held that even if an owner's tort claims against the transportation department for negligent design, construction, trespass, and nuisance causing flooding are barred by a provision of state law,[186] the

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[172] *Id.* at 240.

[173] *Id.* at 241.

[174] *Id.* at 242 (*citing, e.g.*, Persyn v. United States, 34 Fed. Cl. 187, 207 (1995) (observing that a significant decrease in the property's market value "'as a direct result of the overflights'" is a prerequisite for recovery (*quoting* Boardman v. United States, 180 Ct. Cl. 264, 376 F.2d 895, 899 (1967)); Hoyle v. City of Charlotte, 276 N.C. 292, 172 S.E.2d 1, 23–24 (N.C. 1970) (relying on the physical effects of over-flights, including noise, to conclude that over-flights affected the property's market value)).

[175] 73 S.W.3d at 243.

[176] *Id.*

[177] 5 NICHOLS ON EMINENT DOMAIN § 16.08[1], at 16-94–16-95; *see also* Rourke v. Central Mass. Elec. Co., 177 Mass. 46, 58 N.E. 470 (Mass. 1900).

[178] Modern, Inc. v. Fla. Dep't of Transp., 2006 U.S. Dist. LEXIS 45946, at *12 (*citing* Washoe County, Nev. v. United States, 319 F.3d 1320, 1326 (Fed. Cir. 2003) (explaining distinction between regulatory and physical takings) and *quoting* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 538, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005)).

[179] 2006 U.S. Dist. LEXIS 45946, at 12 (*quoting* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 538, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) and c*iting* Washoe County, Nev. v. United States, 319 F.3d 1320, 1326 (Fed. Cir. 2003) (explaining distinction between regulatory and physical takings)).

[180] Vokoun v. City of Lake Oswego, 335 Or. 19, at 26, 56 P.3d 396, 400 (2002) (holding that the evidence was sufficient to show that the natural and ordinary consequence of the city's construction of the storm-drain was to destabilize plaintiffs' property, which had been stable prior to the construction).

[181] 335 Or. at 27, 56 P.3d at 401.

[182] *Id.* at 29, 56 P.3d at 402.

[183] Nolan and Noland v. City of Eagan, 673 N.W.2d 487, 492 (Minn. Ct. App. 2003) (emphasis supplied) (*quoting* Nelson v. Wilson, 239 Minn. 164, 172, 58 N.W.2d 330, 335 (1953) (concluding that a taking occurred when the state's construction of dams resulted in periodic flooding and land remained wet and flooded for several years); Spaeth v. City of Plymouth, 344 N.W.2d 815, 822 (Minn. 1984) (citations omitted)).

[184] Lea Co. v. N.C. Bd. of Transp., 57 N.C. App. 392, 397, 291 S.E.2d 844, 847–48 (1982).

[185] *Id.* at 398, 291 S.E.2d at 848–49 (*quoting* United States v. Cress, 243 U.S. 316, 328, 37 S. Ct. 380, 385, 61 L. Ed. 746, 753 (1917)).

[186] Nolan and Noland v. City of Eagan, 673 N.W.2d at 497 (*citing* MINN. STAT. § 541.051(1)(a)).

owner may still have a claim in inverse condemnation for flooding damages caused by government action. Moreover, it has been held that if the owner has a negligence claim it is not improper for the trial court to submit the inverse condemnation claim to the jury without first adjudicating the negligence claim.[187] A limitation on damages in a state's tort claims act has been held not to apply to a claim in inverse condemnation for flooding damages, in part because "the statutory limitation would deprive claimants" of the value of their property taken in excess of the statutory limit and would deny them "just compensation in the form of the full fair market value taken."[188]

C.2. Claims Based on Alleged Improper Design, Construction, and Maintenance of Highway Facilities

A public entity may be held liable in inverse condemnation "if its design, construction, or maintenance of a public improvement poses an unreasonable risk of harm to the plaintiff's property, and the unreasonable aspect of the improvement is a substantial cause of damage…."[189]

In *Albers v. County of Los Angeles,*[190] involving claims for property damage resulting from a landslide in a prehistoric, known slide area—the subject of a federal government geological report published in 1946[191]—the court held that the damage was compensable for any "actual physical injury to real property proximately caused by the improvement as deliberately designed and constructed," regardless of whether the injury was foreseeable.[192]

In *Nolan and Noland v. City of Eagan,*[193] the court reversed the dismissal of a commercial property owner's claim that MnDOT and the City of Eagan negligently designed and constructed storm sewer systems in connection with highway construction and failed to exercise reasonable care in the maintenance, repair, and operation of the systems that had caused flooding.[194] The court held that allegations of "frequent, regular, and permanent flooding" were sufficient to survive a motion to dismiss.

However, in *Thomas v. City of Kansas City, Mo.,*[195] the owners alleged that flooding was caused by "negligently designed, constructed, and maintained sewer and drainage systems," owned in part by Kansas City and the City of Raytown.[196] Although the court held that the owners stated a claim for personal injuries caused by diversion of surface water and flooding because of the cities' unreasonable use of their property,[197] the owners failed to "plead their claim for property damages by invoking constitutional provisions protecting them from government acquisition of property without due process of law. Nevertheless, the owners did state a claim for *personal injuries*…for unreasonable use of the property belonging to the cities."[198]

In addition to inverse condemnation, a property owner possibly may recover damages based on the government's failure to abate a nuisance or for negligence in regard to flooding caused by the government's design of a drainage system that causes flooding of an owner's property. For example, if "'a municipality negligently constructs or undertakes to maintain a sewer or drainage system which causes the repeated flooding of property, a continuing abatable nuisance is established, for which the municipality is liable.'"[199] Moreover, "one is not barred from bringing an action for damages merely because [the property owner] purchases property in the vicinity of a nuisance."[200]

A claim for flooding damages may fail if it is shown that a highway facility such as a "culvert was designed and constructed in accordance with applicable standards."[201] In contrast, in *Kemna v. Kansas Department of Transportation*,[202] the transportation department "built an embankment which resulted in the loss of 28,000 square feet of waterway for a 350-acre drainage area."[203] The court, affirming the trial court's judgment for the landowners, held that there was "sufficient evidence…to show that KDOT had…failed to design its improvements in accordance with the generally accepted and prevailing engineering standards in existence at the time."[204] Both the *Knospe* and *Kemna* cases

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[187] Vokoun v. City of Lake Oswego, 189 Or. App. 499, 506, 76 P.3d 677, 681 (Or. Ct. App. 2003) (decision on remand).

[188] *Id.* at 511, 76 P.3d at 684.

[189] Arreola v. County of Monterey, 99 Cal. App. 4th 722, 739, 122 Cal. Rptr. 2d 38, 51 (Cal. App. 6th Dist. 2002). The court held that it was the counties' "long standing policy" to allow the project to deteriorate that caused the damage. *Id.,* 99 Cal. App. 4th at 741, 122 Cal. Rptr. 2d at 53.

[190] 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965).

[191] *Id.* at 254, 398 P.2d at 131, 42 Cal. Rptr. at 91.

[192] *Id.* at 263, 398 P.2d at 137, 42 Cal. Rptr. at 97.

[193] 673 N.W.2d 487 (Minn. Ct. App. 2003).

[194] *Id.* at 491.

[195] 92 S.W.3d 92 (Mo. App. W. Dist. 2002). The owners had appealed the dismissal of their claim for damages and injunctive relief caused by surface water flooding that was caused by the condition of two municipalities' property. The owners alleged that prior to 1998 their property had experienced problems with flooding and that they had notified the cities but that in July and October 1998, "groundwater mixed with sewage overflowed and spilled out of a ditch and entered the Thomases' home; and that this continued to occur during periods of rain in 1999 and 2000." *Id.* at 94.

[196] *Id.* at 94.

[197] *Id.* at 102.

[198] *Id.* at 99.

[199] Martin v. City of Fort Valley, 235 Ga. App. 20, 508 S.E.2d 244, 245 (1998) (citations omitted).

[200] Lea Co. v. N.C. Bd. of Transp., 57 N.C. App. at 402, 291 S.E.2d at 851. The court rejected the department's attempted "moving to the nuisance" defense in an inverse condemnation or nuisance action. *Id*., 57 N.C. at 403, 291 S.E.2d at 851.

[201] Knospe v. New York, 862 N.Y.S.2d 808, 2005 NY Slip Op 51804U, at *2, 9 Misc. 3d 1126A, at 1126A (N.Y. Ct. Cl. 2005).

[202] 19 Kan. App. 2d 846, 877 P.2d 462 (1994).

[203] *Id.* at 851, 877 P.2d at 465.

[204] *Id.* at 850, 877 P.2d at 465.

discussed immediately above appear to have been based solely on defendants' negligence rather than inverse condemnation.

C.3. Claims Based on Alleged Improper Construction, Reconstruction, or Maintenance

A transportation department's improper construction or reconstruction of highway facilities or improper maintenance of the same may give rise to an inverse condemnation claim for damages caused by flooding of property affected by the alteration of the flow or quantity of surface water. In *Taylor v. State,*[205] the property owners alleged that the transportation department's construction with respect to two bridges caused flooding on their property "rendering it useless for any commercial purpose."[206] The court stated that in Louisiana

> La. Civ. Code art. 655 provides that "an estate situated below is bound to receive the surface waters that flow naturally from an…estate situated above unless an act of man has created the flow." Additionally, La. Civ. Code art. 656 provides in part that "the owner of the dominant estate may not do anything to render the servitude more burdensome." Furthermore, the owner of the dominant estate "cannot stop [water running through it] or give it another direction and is bound to return it to its ordinary channel *where it leaves his estate*." La. Civ. Code art. 658.[207]

In *Taylor* the court agreed that the "DOTD has not increased the total volume flowing through the Taylors' property…. However, DOTD has changed the natural course of the flow by redirecting the water…."[208] Consequently,

> [w]hile DOTD returned the water to its ordinary channel, DOTD did not comply with the mandate of La. Civ. Code art. 658 in that it returned the water to its ordinary channel some 400 feet south of its property and not before the water left its property. While the total volume flowing through the Taylors' property remains the same, the water arrives at the Taylors' property much more quickly than before.[209]

The court amended the award on damages but otherwise affirmed the judgment in favor of the owners.[210]

In *Cops v. City of Kaukauna,*[211] the owners, who alleged that flooding in the basement of their building with no prior history of flooding was caused by the city's and the Wisconsin Department of Transportation's "improper reconstruction of a bridge," sued for negligence, nuisance, and inverse condemnation.[212] The court held that "for a taking to be compensable, the property owner must be deprived of all, or practically, all, of the beneficial use of the property or any part."[213] Because the plaintiffs alleged what the cost would be "to *attempt* to restore the property,"[214] the complaint stated a cause of action against the city and the DOT. The court stated that "[i]f the attempt fails, the flooding may constitute a taking, and if can be repaired, it may be mere damage," an issue to be resolved on summary judgment or at trial.[215]

Unlike in the *Cops* case, there may be a history of flooding at the site where there are new or reconstructed highway facilities. If so, unless it is established that the new construction or reconstruction has increased the flow of surface water, the transportation department may be held not liable in inverse condemnation for flooding damages. For example, in *Brandywood Housing Ltd. v. Texas Department of Transportation,*[216] the property owner claimed that the department's reconstruction of a nearby highway caused an apartment complex to flood. However, there was a history of flooding at the location of the housing complex.[217]

In affirming the trial court's ruling that the evidence failed to show that the 1995 reconstruction increased the preexisting flooding problems,[218] the court stated that

> [a] "taking or damaging" by flooding is a specific type of inverse condemnation…. In such cases, an issue about causation may be raised if the evidence shows that the property was subject to flooding both before and after the government's action…. In Ansley [*v. Tarrant County Water Control & Imp. Dist. No. 1*, 498 S.W.2d 469, 475 (Tex. Civ. App.—Tyler 1973), writ ref'd n.r.e.], the court noted: If the land was previously subject to inundation, and after the [governmental action] was still subject to inundation, it has been held that the owner was not entitled to recover for the damages caused thereby, unless the inundation after [the governmental action] was greater in extent than it previously had been.[219]

In regard to maintenance, because government action must relate to a public use for there to be liability in inverse condemnation, maintenance activity also may give rise to complaints regarding flooding. "A public entity's maintenance of a public improvement constitutes the constitutionally required public use so long as it is the entity's deliberate act to undertake the particu-

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[205] 879 So. 2d 307 (La. App. 3d Cir. 2004).

[206] *Id.* at 311.

[207] *Id.* at 316 (emphasis in original).

[208] *Id.* at 317.

[209] *Id.*

[210] *Id.* at 320. *See also* Shade v. Mo. Highway and Transp. Dep't, 69 S.W.3d 503, 507 (Mo. App. W. Dist. 2001 (reconstruction project elevated the height of the grade of the highway, which allegedly "materially changed and altered the flow of surface water from the [owners'] property and property surrounding [owners'] property").

[211] 2002 Wis. App. 241, 257 Wis. 2d 937; 652 N.W.2d 132 (Wis. App. 2002).

[212] 2002 Wis. App. 241, at P1.

[213] 2002 Wis. App. 241, at P8.

[214] 2002 Wis. App. 241, at P8, P9 (emphasis supplied).

[215] 2002 Wis. App. 241, at P10.

[216] 74 S.W.3d 421 (Tex. App. 1st Dist. 2001).

[217] *Id.* at 423.

[218] *Id.* at 426.

[219] *Id.* (emphasis supplied).

lar plan or manner of maintenance."[220] Thus, maintenance activity also may give rise to claims based on flooding.

C.4. Liability for Diversion of Surface Water

As explained in *Nichols on Eminent Domain*, if a "flood-control structure was designed to protect the injured property, the plaintiff must demonstrate unreasonable conduct by the government entity that is responsible for construction or maintenance of the structure."[221] On the other hand, "[i]f the flood-control structure was designed to protect property other than the injured property, the plaintiff need not demonstrate unreasonable conduct, and the typical rules of inverse condemnation apply," with certain exceptions.[222] One such exception is the "common enemy doctrine" that "provides that the owner of land that is subject to flooding is entitled to erect defense barriers to protect the land from the increased discharge or velocity of water."[223]

Although it is beyond the scope of this report to discuss in detail the common enemy doctrine and the doctrine of reasonable use with respect to liability for surface water, in recent cases the courts have adopted the rule of reasonable use. The rule of reasonable use

> provides that each possessor of land is legally entitled to make reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others; however, *the possessor incurs liability when the harmful interference with the flow of surface waters is unreasonable*…. The rule of reasonable use does not purport to lay down specific rights with respect to surface waters, but "leaves each case to be determined on its own facts, in accordance with general principles of fairness and common sense."[224]

In a case in which the owners alleged that flooding was caused by "negligently designed, constructed, and maintained sewer and drainage systems" owned in part by two cities, the court held that the owners stated a claim for personal injuries caused by diversion of surface water and flooding as a result of the cities' unreasonable use of their property causing damage to the owners' property.[225] Relying on *Heins Implement Co. v. Missouri Highway and Transportation Comm'n,*[226] the court noted that "[i]n *Heins* the court discarded the 'common enemy' doctrine as to surface waters and adopted the 'rule of reasonable use.'"[227]

The court explained that although

> *Heins* did not affect all claims of trespass related to water, *Heins* did change the analysis with regard to claims based on diversion of surface water. The Court in *Heins* held, with regard to a claim of property damage against a governmental entity having the power of eminent domain, that the proper remedy for surface water flooding is an action in inverse condemnation….[228]

In *Dickgieser v. Washington,*[229] the owners sued in inverse condemnation regarding logging on state lands located adjacent to the owners' property that resulted in flooding of the plaintiffs' property.[230] The state argued that, because the owners' claim for inverse condemnation was "based on surface water flooding," the property owners "also must produce evidence demonstrating that the Department artificially collected, channeled, and discharged surface water onto their property in a manner different from the natural flow, thereby causing substantial injury to the land…."[231] The court reviewed the law in the state of Washington on liability for damage caused by surface water from neighboring properties, and stated:

> A governmental body ordinarily is not liable for consequential damages to neighboring properties due to increased surface water flows if the damages arise only from changes in the character of the surface resulting from the opening of streets and public facilities…. However, *the government may be liable if it concentrates and gathers water into artificial drains or channels and discharges it upon adjoining lands in quantities greater than or in a manner different from the natural flow…. Further, the flow of surface water along natural drains may be hastened or incidentally increased by artificial means, so long as the water is not ultimately diverted from its natural flow on the other's property*…. In *Wilber Development Corp. v. Les Rowland Construction, Inc.*, 83 Wn. 2d 871, 876, 523 P.2d 186 (1974) this court held that if water is "collected and deposited upon the land in a different manner" than before development, compensation to the property owner may be required. *Thus, in the proper case, damage caused by surface water may support an inverse condemnation action.*[232]

The court held that there were material facts in dispute "regarding whether the Department's logging activity concentrated and gathered water into artificial

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[220] Arreola v. County of Monterey, 99 Cal. App. 4th at 742, 122 Cal. Rptr. 2d at 53 (*citing* Bauer v. County of Ventura, 45 Cal. 2d 276, 284–85, 289 P.2d 1 (1955)).

[221] 9 NICHOLS ON EMINENT DOMAIN § 34.03[2][e], at 34-56-1.

[222] *Id.*

[223] *Id.*

[224] Thomas v. City of Kansas City, Mo., 92 S.W.3d 92, 98 (Mo. App. W. Dist. 2002) (citations omitted) (emphasis supplied).

[225] *Id.* at 94.

[226] 859 S.W.2d 681 (Mo. 1993) (en banc).

[227] 92 S.W.3d at 98 (*citing* Heins Implement Co. v. Mo. Highway and Transp. Comm'n, 895 S.W.2d 681, 688–90 (Mo. 1993)).

[228] *Id.* at 98.

[229] 153 Wash. 2d 530, 105 P.3d 26 (Wash. 2005).

[230] *Id.* at 532, 105 P.3d at 27.

[231] *Id.* at 542, 105 P.3d at 32 (citation omitted).

[232] *Id.* at 542–43, 105 P.3d at 32–33 (emphasis supplied), (*citing* Phillips v. King County, 136 Wash. 2d 946, 958–59, 968 P.2d 871 (1998); 18 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.144, at 538 (3d rev. ed. 1963); B&W Constr., Inc. v. City of Lacey, 19 Wash. App. 220, 223, 577 P.2d 583 (1978)).

channels or drains and discharged it onto the Dickgiesers' land in quantities greater than or in a different manner than the natural flow."[233]

The case of *Albers v. County of Los Angeles*[234] held that the inverse condemnation plaintiff was entitled to compensation without regard to fault. As explained by an appellate court in California in *Arreola v. County of Monterey,*[235] the *Albers* case left open an

> exception [that] involved the circumstances, peculiar to water law, in which a landowner had a right to inflict damage upon the property of others for the purpose of protecting his or her own property. Such circumstances included the erection of flood control measures (the common enemy doctrine) and the discharge of surface water into a natural watercourse (the natural watercourse rule). Under private water law analysis, these rules immunized the landowner from liability for resulting damage to downstream property.[236]

However, as the *Arreola* court explained, the case of

> Belair [v. Riverside County Flood Control Dist., 47 Cal. 3d 550, 563-564, 253 Cal. Rptr. 693, 764 P.2d 1070 (1988)] modified Albers and adopted a rule of reasonableness to be applied in the context of flood control litigation. Belair determined that application of the Albers rule of strict liability would discourage needed flood control projects by making the entity the insurer of the property the project was designed to protect…. Belair held: "[W]here the public agency's design, construction or maintenance of a flood control project is shown to have posed an unreasonable risk of harm to the plaintiffs, and such unreasonable design, construction or maintenance constituted a substantial cause of the damages, plaintiffs may recover regardless of the fact that the projects purpose is to contain the 'common enemy' of floodwaters…." Under Belair, the public entity is not immune from suit, but neither is it strictly liable.[237]

The *Arreola* court further explained that in *Locklin v. City of Layfette,*[238] the California Supreme Court held "that the privilege to discharge surface water into a natural watercourse (the natural watercourse rule) was a conditional privilege, subject to the *Belair* rule of reasonableness."[239] The *Locklin* court set forth certain factors for determining when the government's action was reasonable:

> (1) The overall public purpose being served by the improvement project; (2) the degree to which the plaintiff's loss is offset by reciprocal benefits; (3) the availability to the public entity of feasible alternatives with lower risks; (4) the severity of the plaintiff's damage in relation to risk-bearing capabilities; (5) the extent to which damage of the kind the plaintiff sustained is generally considered as a normal risk of land ownership; and (6) the degree to which similar damage is distributed at large over other beneficiaries of the project or is peculiar only to the plaintiff.[240]

In *Arreola*, involving claims by about 300 businesses and individuals, the court affirmed a judgment for the plaintiffs with respect to "extensive damage caused when the Pajaro River Levee Project (the Project) failed during a heavy rainstorm in 1995."[241] A river channel had become clogged due to increased vegetation that had not been removed.[242] The allegations against the state were that the drainage culverts under the highway were too small.[243] When the river overtopped the levee the back side gave way; "[w]hen the levee failed, the floodwaters ran onto the historically flooded valley floor until they reached the Highway 1 embankment"; the culverts were overwhelmed, resulting in more flooding than otherwise would have occurred.[244]

Although the *Arreola* court found that the *Belair* test "modified the general rule when it decided that a rule of reasonableness, rather than the extremes of strict liability or immunity, was appropriate in cases involving flood control projects,"[245] the rule of reasonableness did not apply to the state's conduct with respect to the culverts.

> The general rule is that a public entity is liable for inverse condemnation regardless of the reasonableness of its conduct…. *Belair* modified the general rule when it decided that a rule of reasonableness, rather than the extremes of strict liability or immunity, was appropriate in cases involving flood control projects….[246]

Thus, the *Belair* rule of reasonableness did not apply to the state's action.[247] The state was held "liable in tort and inverse condemnation for damage caused when Highway 1 obstructed the path of the floodwater on its way to the sea."[248] The court noted that in regard to the state's obstruction of the flood plain, "[t]raditionally, a lower landowner that obstructs a natural watercourse is liable for damages that result from that obstruction."[249] Here, the state had foreseen, moreover, that water would back up at the location even without a flood. The court held that the state could not avoid liability, regardless of the fact of the levee's failure.

> State cannot avoid liability for the 1995 flood because the Project failed rather than because the storm overwhelmed it. State was expected to design its drainage for a 100-year storm. Since a flood was almost certain to occur in the event of a 100-year storm, State, as a downstream ri-

[233] 153 Wash. 2d at 543, 105 P.3d at 33.

[234] 62 Cal. 2d 250, 42 Cal. Rptr. 89, 398 P.2d 129 (1965).

[235] 99 Cal. App. 4th 722, 122 Cal. Rptr. 2d 38 (2002).

[236] *Id*. at 738–39, 122 Cal. Rptr. 2d at 50.

[237] 99 Cal. App. 4th at 738–39, 122 Cal. Rptr. 2d at 50–51 (citations omitted) (emphasis supplied).

[238] 7 Cal. 4th 327, 350, 867 P.2d 724, 27 Cal. Rptr. 2d 613 (1994).

[239] 99 Cal. App. 4th at 739, 122 Cal. Rptr. 2d at 51.

[240] 7 Cal. 4th at 368–69, 867 P.2d at 750, 27 Cal. Rptr. at 639.

[241] 99 Cal. App. 4th at 730, 122 Cal. Rptr. 2d at 44.

[242] *Id.* at 733, 734, 122 Cal. Rptr. 2d at 46, 47.

[243] *Id.* at 731, 122 Cal. Rptr. 2d at 44.

[244] *Id.* at 736, 122 Cal. Rptr. 2d at 49.

[245] *Id.* at 751, 122 Cal. Rptr. 2d at 60.

[246] *Id.*

[247] *Id.* at 754, 122 Cal. Rptr. 2d at 63.

[248] *Id.* at 730, 122 Cal. Rptr. 2d at 44.

[249] *Id.* at 755, 122 Cal. Rptr. 2d at 64 (citation omitted).

parian landowner, had a duty to design the highway bypass to avoid obstructing the geologic floodplain. Therefore, it does not matter that the storm that generated the flood in this case was of a lesser magnitude and should have been contained by the Project. State had a duty to anticipate the consequences of a 100-year storm and design accordingly.[250]

The state also did not have any immunity for design under California Goverment Code 830.6, the state's design immunity statute for public improvements, in part because the state did not offer "substantial evidence of reasonableness" on which a "public employee could have approved a design that did not take flooding into account."[251] As for the counties' involvement, the court held, in affirming the trial court's judgment, that the trial court properly considered the *Locklin* factors in finding that it was the counties' "long standing policy" to allow the Project to deteriorate, a policy that caused the damage as a result of the Project's failure.[252]

Similarly, there was a taking caused by flooding in an Oklahoma case involving the closing of a culvert that resulted in "regular flooding" of the owner's property.[253] The court held that a leasehold interest may be subject to a taking and that the leaseholder may have a cause of action in inverse condemnation. Furthermore, the court stated that "business losses are admissible to prove the diminution in fair market value of the property taken."[254] Although the state argued that the culvert had become a natural watercourse, the court affirmed a jury verdict awarding $160,000 in connection with the taking.[255]

C.5. Miscellaneous Issues Associated with Claims for Flooding Damages

C.5.a. Date of Accrual of Cause of Action for Flooding Damages

Because flooding may be recurrent, there may be an issue regarding when the owner's cause of action accrued for purposes of applicable statutes of limitations with respect to damages to real property and to personal property. In *Shade v. Missouri Highway and Transportation Commission,* [256] a reconstruction project by the commission that elevated the height of the grade of the highway was alleged to have "materially changed and altered the flow of surface water from the [owners'] property and property surrounding [owners'] property."[257] One issue was whether the action was time-barred, as the trial court had held in granting the commission's motion for summary judgment.[258]

The court addressed "whether each flood event created a new cause of action. This determination depends upon the type of damage sustained by the real estate, *i.e*., if it is permanent or temporary."[259]

> *If the damage to the property is permanent, the cause of action accrues when the effect of the injury becomes manifest*…. The damage "will admit of but one recovery, which will obviously include all damages, past, present, and prospective…." On the other hand, because a temporary nuisance can be abated at any time, the period of limitations "runs anew from the accrual of the injury from every successive invasion of interest…."[260]

The court held that the damage was permanent, not temporary, and thus there was only one cause of action.[261] "[T]he damage may not be ascertainable on the date of the first flood. It may well be that it would only become 'apparent by the passage of time that the intermittent flooding was of a permanent nature.'"[262] Although claims for damage to personal property were subject to a 5 year statute of limitations, rather than a 10 year statute of limitations, the court agreed that

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[250] *Id.* at 756, 122 Cal. Rptr. 2d at 65.

[251] *Id.* at 759, 122 Cal. Rptr. 2d at 67.

[252] *Id.* at 741, 122 Cal. Rptr. 2d at 53.

[253] Perkins Whistlestop, Inc. v. State *ex rel*. DOT, 1998 OK Civ. App. 7, 954 P.2d 1251 (Okla. Ct. Civ. App. 1997).

[254] *Id.* at *10, 954 P.2d at 1255 (citations omitted).

[255] *Id.* at *1, *11, 954 P.2d at 1253, 1255.

[256] 69 S.W.3d 503 (Mo. App. W. Dist. (2001)).

[257] *Id.* at 507.

[258] As for the claim for damages to the real property, the court held that the statute of limitations was 10, not 5, years.

> No limitation period is contemplated by either the United States or Missouri Constitutions, and we find no specific limitation period set forth in a statute that applies to real property inverse condemnation claims. We hold that the statute of limitations in real property inverse condemnation cases such as the one at bar must not be shorter than that required for the entity with the power of eminent domain to obtain a prescriptive easement on the property. The time required to obtain a prescriptive easement is ten years…. The statute of limitations for real property inverse condemnation actions, then, must also be ten years….

69 S.W.3d at 512–13 (*citing* Phillips v. Sommerer, 917 S.W.2d 636, 638 (Mo. App. W. Dist. 1996); Corbell v. State *ex rel.* Dep't of Transp., 856 P.2d 575, 579 (Okla. Ct. App. 1993) ("To hold otherwise would be to allow the taking entity to effectively gain title, or at least some property interest, short of the prescriptive period."); Underwood v. State *ex rel*. Dep't of Transp., 849 P.2d 1113, 1117 (Okla. Ct. App. 1993); Barker v. St. Louis County, 340 Mo. 986, 104 S.W.2d 371, 374–77 (Mo. 1937) (finding that a state statute was invalid to the extent that it permitted private property to be taken for public use in a period shorter than that required to adversely possess the property); Annotation, 26 A.L.R. 4th 68, *State Statute of Limitations Applicable to Inverse Condemnation or Similar Proceedings by Landowner to Obtain Compensation for Direct Appropriation of Land Without the Institution or Conclusion of Formal Proceedings Against Specific Owner,* §§ 6[a] and 7[a]. In *Shade* the court held that the statute of limitations for damage to personal property was five years. *Id.* at 514.

[259] 69 S.W.3d at 513.

[260] *Id.* (citations omitted) (emphasis supplied).

[261] *Id.*

[262] *Id.* at 514 (*quoting* Barnes v. United States*,* 210 Ct. Cl. 467, 538 F.2d 865, 873 (Ct. Cl. 1976)). The court remanded because it was unable to determine from the record "with any degree of certainty when the various causes of action were capable of ascertainment." *Id.* at 515.

"damages to personal property are compensable in an inverse condemnation proceeding."[263]

C.5.b. Ripeness of the Claim in Inverse Condemnation for Flooding Damages

In an Illinois case a beneficiary and a trustee of a family trust sued in federal court in connection with the defendants' construction about 20 years earlier of a roadway and water main.[264] The owner had never been compensated for "the loss of Trust property, whether in connection with the construction of [the road], the pooling of water on the property, or the construction of the water main."[265] The construction of the road caused water to pool on the property and to create wetlands.[266] The plaintiffs, asserting claims, *inter alia*, under 42 U.S.C. § 1983[267] and the Fifth Amendment, challenged the original taking of property accomplished by a city ordinance in 1978, which at the time the Popps had failed to challenge.[268] However, the court held that the Popps' claim in federal court "even at this late date, is premature" for lack of ripeness.[269] Thus, the court dismissed the inverse condemnation and due process claims, holding that "Illinois provided adequate procedures for remedying the injuries alleged; because the Popps have not used those procedures, they cannot bring their claims in this Court…. The Court reaches the same conclusion with respect to the Popps' due process claims."[270]

Also in regard to the ripeness doctrine, as one authority notes, "[t]he courts, especially the federal courts, have made it very clear that they do not want to see cases involving challenges to land use laws and regulations until after all administrative remedies for relief have been pursued."[271]

C.5.c. Proof of Causation Required for a Claim for Flooding Damages

Causation must be established in an inverse condemnation claim for flooding damages. "To prove causation in a 'taking or damaging' case involving preexisting flooding, the plaintiff is required to show the following: (1) the government's action caused the flooding to increase, and (2) that the increased flooding caused a diminished market value of the property."[272] As held by a California court, the "injuries must have been proximately caused by the public improvement as deliberately constructed and planned."[273] It has been held that even a 100-year flood is "legally foreseeable" by a transportation department when designing flood control devices.[274]

As stated in a North Carolina case, in which the transportation department was held liable for damages to property caused by a 100-year flood, the North Carolina Court of Appeals stated that the

> [p]laintiff must first prove that defendant could reasonably foresee the overflow. Defendant assigns error to the conclusion that the flood here was a "reasonably foreseeable and recurring [event]." The [trial] court concluded that the interest taken by defendant is maximally measured by the overflow of waters occasioned by a 100 year flood, since the flooding here was at approximately 100 year flood levels. This conclusion is supported by the findings which in turn are supported by competent evidence in the record…. Defendant does not dispute that a 100 year flood is one which, as a matter of statistical probability, can be anticipated to occur once in every 100 years. *A foreseeable flood is not an extraordinary one, but "one, the repetition of which, although at uncertain intervals, can be anticipated…."*[275]

However, in a case in which the owner knew that the property had some history of flooding prior to the owner's purchase of an apartment complex, and the property continued to flood after the department's completion of highway reconstruction,[276] the owner failed to

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[263] *Id.* at 516 (*citing* Warner/Elektra/Atlantic Corp. v. County of DuPage, Ill., 771 F. Supp. 911, 914 (N.D. Ill. 1991); Hawkins v. City of La Grande, 102 Or. App. 502, 795 P.2d 556, 559 (Or. Ct. App. 1990), *aff'd in part, rev'd in part on other grounds*, 315 Or. 57, 843 P.2d 400 (Or. 1992); Shelby County v. Barden, 527 S.W.2d 124, 132 n.4 (Tenn. 1975); Sutfin v. California, 261 Cal. App. 2d 50, 67 Cal. Rptr. 665, 666–68 (Cal. App. 3d Dist. 1968)).

[264] Popp v. City of Aurora, 2000 U.S. Dist. LEXIS 5708 (N.D. Ill. 2000).

[265] *Id.* at *4.

[266] *Id.*

[267] The court ruled that the § 1983 claims were time barred. *Id*. at *24, 29.

[268] *Id.* at *4.

[269] *Id.* at *14.

[270] *Id.* at *20–21 (*citing* Forseth v. Village of Sussex, 199 F.3d 363, 369 (7th Cir. 2000) ("Although we have recognized the potential for a plaintiff to maintain a substantive due process claim in the context of land use decisions, …we have yet to excuse any substantive due process claim in the land-use context from Williamson's ripeness requirements."); Unity Ventures v. County of Lake, 841 F.2d 770, 776 (7th Cir. 1998) (Ripeness applies to procedural due process claims as well as takings and substantive due process claims. The court stated that it would "not evaluate the adequacy of the procedures available to the plaintiffs before they have availed themselves of those procedures.")).

[271] 8 NICHOLS ON EMINENT DOMAIN § 14E.07[3], at 14E-90.

[272] Brandywood Hous. Ltd. v. Tex. DOT, 74 S.W.3d at 426.

[273] Arreola v. County of Monterey, 99 Cal. App. 4th at 738, 122 Cal. Rptr. 2d at 50 (*citing* Holtz v. Superior Court*,* 3 Cal. 3d 296, 304, 90 Cal. Rptr. 345, 475 P.2d 441 (1970)).

[274] Lea Co. v. N.C. Bd. of Transp., 57 N.C. App. at 397, 291 S.E.2d at 848.

[275] *Id.* (citations omitted) (emphasis supplied). The court stated that

> [t]he conclusion is further supported by the finding, to which defendant did not except, that defendant's own *Handbook of Design for Highway Drainage Structure* requires it to "check the effect of the 100 year flood when designing box culverts under interstate highways and make adjustments to the design criteria as necessary." *Id.*

[276] Brandywood Hous. Ltd. v. Tex. DOT, 74 S.W.3d at 423.

prove that "TexDOT's reconstruction was a 'cause-in-fact' of the flooding."[277]

> "If the land was previously subject to inundation, and after the [governmental action] was still subject to inundation, it has been held that the owner was not entitled to recover for the damages caused thereby, unless the inundation after [the governmental action] was greater in extent than it previously had been."[278]

Thus, if the property "would have flooded even without the [highway's] reconstruction…, it cannot be said that TexDOT's action was a 'cause in fact' of Brandywood's damage, unless TexDOT's reconstruction exacerbated the flooding…."[279] The court concluded that the "evidence was legally sufficient to show that the 1995 reconstruction of the roadway did not increase the pre-existing flooding problems."[280]

An expert may be required to prove that the highway department caused an owner's property to flood. However, in *Commissioner of Transportation v. BRW Management, LLC,*[281] the court held that a plaintiff's expert's reliance on a highway department's expert's work was insufficient to establish causation.

> While an expert may express an opinion on any subject upon which he is qualified drawn from whatever sources he chooses to use, the value of that opinion, while admissible, is jeopardized by the fact that he performed no study, no survey or other related services and utilized the work expressed in the report of an opposing expert. This is a serious flaw in the expert's opinions in the eyes of this court and it is certainly less than persuasive.[282]

Thus, the plaintiff's claim failed because the plaintiff's expert's "opinions were based on an interpolation" of the state's expert, also a hydrologist, who conducted a hydrological survey of the property and the water conditions, and thereafter provided a copy of the report to the owner's expert.[283]

C.5.d. Trespassing on an Owner's Property in Response to a Flooding Emergency

Incidents of flooding may require the responsible government agency to take action to protect neighboring property, including acts of trespass and damage to other property. In a Louisiana case in which a city dug three drainage ditches on the plaintiffs' property without the owners' consent[284] because of the flooding of a road that threatened a neighborhood,[285] the court held that the plaintiffs were entitled to damages in inverse condemnation.[286] In addition, because the city committed a trespass the owners were entitled also to "mental anguish damages under general tort law."[287] Finally, "because the City/Parish committed an 'intentional act,' its actions [were] excluded under its excess insurance policy's 'intentional act' exclusion."[288]

D. COMPENSATION FOR POLLUTION DAMAGES

When a condemning authority causes pollution it may be liable in inverse condemnation for a taking. One of the more common forms of pollution damages is water pollution affecting an owner having littoral rights. One issue is whether the pollution is permanent or temporary. If the pollution is temporary or intermittent, it may be possible to abate the pollution, in which case a recovery may be had only for past injury.[289] If a condemning authority does not have sovereign immunity, the owner's action may be in tort. If a condemning authority does have sovereign immunity, the owner may have a recovery in inverse condemnation, because the landowner has lost full use of his property, at least during the period the pollution was not abated, and is entitled compensation for a taking.[290]

In *Duffield v. DeKalb County,*[291] an inverse condemnation case for damages caused by noxious odors as well as noise from a water pollution control plant, the odors and noise affected the property before the owners purchased it, but the odors and noise worsened after the owners' purchase.[292] Nevertheless, the court held that the owners had stated a claim because the condition was not a temporary one.[293] Although the owners purchased the property "subject to the burden" of an existing condition of odors and noise, the pleadings "tend[ed] to show an increased 'burden'" thereafter.[294]

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[277] *Id.* at 424.

[278] *Id.* at 426 (*quoting* Ansley v. Tarrant County Water Control & Imp. Dist. No. 1, 498 S.W.2d 469, 475 (Tex. Civ. App., Tyler 1973), *writ ref'd n.r.e.*) (some citations omitted).

[279] *Id.*

[280] *Id.* at 427.

[281] 2003 Conn. Super. LEXIS 1863 (Danbury Dist. 2003) (Unrept.) (owner alleged that construction of a new highway would cause increased water drainage and flooding of the owner's property).

[282] *Id.* at *8–9 (footnote omitted).

[283] *Id.*

[284] Williams v. City of Baton Rouge, 731 So. 2d 240, 243 (1999).

[285] *Id.* at 246.

[286] *Id.*

[287] *Id.* at 254.

[288] *Id.*

[289] 4A NICHOLS ON EMINENT DOMAIN, § 14A.08[1], at 14A-173–74.

[290] Sandell v. Town of New London, 119 N.H. 839, 409 A.2d 1315 (1979).

[291] 242 Ga. 432, 249 S.E.2d 235 (1978).

[292] *Id.* at 432, 249 S.E.2d at 236.

[293] *Id.* at 434, 249 S.E.2d at 237 (*citing* Ingram v. City of Acworth, 90 Ga. App. 719, 84 S.E.2d 99 (1954) (odors); Warren Co. v. Dickson, 185 Ga. 481, 195 S.E. 568 (1938) (noise); Holman v. Athens Empire Laundry Co., 149 Ga. 345, 100 S.E. 207 (1919) (smoke); Kea v. City of Dublin, 145 Ga. 511, 89 S.E. 484 (1916) (odors)).

[294] *Id.* at 436, 249 S.E.2d at 238.

E. COMPENSATION FOR EROSION DAMAGES

The most expected type of erosion from a highway project would be the erosion of soil that is not vegetated during construction. A prime example of damage from this type of erosion would be silt flowing into ponds, lakes, or wetlands.

In an erosion case in California, the State "concede[d] that there [had] been a substantial decrease in depth of water over plaintiff's submerged land, but assert[ed] that it [did] not result from deposit of material from the highway cuts and fills."[295] The court held that the jury was properly instructed "that the state is liable for any additional erosion of materials proximately caused by the highway or its construction to be 'carried down by winter rains…and deposited on the lands of' plaintiff."[296] The court affirmed the jury's verdict that there was not a taking.

An important issue in an erosion case, however, is the date the cause of action accrued for purposes of determining whether an action is time-barred. A constitutional right may be barred by a statute of limitations.[297]

> [A] cause of action
>
> "accrues after the full extent of the Plaintiff's loss of use and enjoyment of [the premises] becomes apparent…." "The actual date of taking, although not readily susceptible to exact determination, is to be fixed at the point in time at which the impairment, of such a degree and kind as to constitute a substantial interference with plaintiff's property interest, *becomes apparent.*"[298]

In a case involving siltation of a lake, there was an issue when the siltation occurred and the cause of action accrued. In ruling that the trial court erred in granting a summary judgment to the transportation department, the court held that

> where there is continuous governmental activity that damages private property, it makes sense to utilize a "'date of stabilization'" of the impact as the date of taking, as has been done by courts in other jurisdictions…. "This method measures the date of the governmental 'taking' as of the point in time when the damaging activity has reached a level which substantially interferes with the owner's use and enjoyment of his property…." Prior to the time of stabilization, landowners may be uncertain whether the governmental invasion was of such a degree that they should seek compensation. Furthermore, fixing the date of taking at an earlier time may lead to piecemeal assessments of the damages because the landowner will not know when the causative factors of the damage will stabilize. After the damage has stabilized, however, the landowner will be well-situated to evaluate the full extent of the damage to his or her property and the amount of compensation necessary to redress the damage.[299]

The Supreme Court of Idaho held in an erosion case that a taking may have occurred based on a single event that "triggered the running of the limitation period" rather than additional activity occurring after the statute of limitations expired that "causes interference with the property… [that] activate[s] a new statute of limitations period."[300]

F. COMPENSATION FOR INTERFERENCE WITH VISIBILITY OR VIEW

F.1. Loss of Visibility

Generally an owner of land abutting a public street has easements of light, air, and view over the street.[301] If a governmental agency interferes with light, air, and view of abutting owners, the government's action may result in a constitutional taking,[302] but as long as the interference is reasonable the court may find that there has not been a taking.[303] Claims based on loss of visibility arise more often in connection with commercial property, whereas claims based on loss of view tend to arise more frequently in regard to residential property.[304]

The possible legal approaches to claims for loss of visibility were summarized in 2006 in *Regency Outdoor Advertising, Inc. v. City of Los Angeles.*[305] The city planted palm trees on city-owned property along a public street that Regency claimed "made several of its roadside billboards less visible…."[306] Regency thus claimed "that it possesse[d] an abutter's right to have

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[295] Arques v. California, 199 Cal. App. 2d 255, 256; 18 Cal. Rptr. 397, 398 (Cal. App. 1st App. Dist. 1962).

[296] *Id.* at 257, 18 Cal. Rptr. at 399.

[297] Higginson v. Wadsworth, 128 Idaho 439, 442 915 P.2d 1, 4 (1996) (*citing* United States v. Dickinson, 331 U.S. 745, 67 S. Ct. 1382, 91 L. Ed. 1789 (1947)).

[298] *Id.* at 442, 915 P.2d at 4 (emphasis in original) (*quoting* Tibbs v. City of Sandpoint, 100 Idaho 667, 671, 603 P.2d 1001, 1005 (1979)).

[299] Hulsey v. Dep't of Transp., 230 Ga. App. 763, 766, 498 S.E.2d 122, 126 (1998) (emphasis supplied) (*citing* 5 NICHOLS ON EMINENT DOMAIN (1997) § 18.16, at 110–11; United States v. Dickinson, 331 U.S. 745, 747–49, 67 S. Ct. 1382, 91 L. Ed. 1789 (1947); Smart v. City of Los Angeles, 112 Cal. App. 3d 232, 169 Cal. Rptr. 174, 176 (Cal. App. 2d Dist. 1981)).

[300] Higginson v. Wadsworth, 128 Idaho at 443, 915 P.2d at 5.

[301] Williams v. State, 65 Misc. 2d 943, 319 N.Y.2d 551 (Ct. Cl. 1971); Bramson v. Bara, 33 Ohio Misc. 186, 293 N.E.2d 577 (Ct. Com. P1. 1971).

[302] Willamette Ironworks v. Or. Ry. and Navigation Co., 26 Or. 224, 228, 37 P. 1016, 1017 (1894); *see also* KAMO Elec. Coop., Inc. v. Cushaud, 416 S.W.2d 646, 654 (Mo. App., Kan. City Dist. 1967) (*aff'd*, 455 S.W.2d 513 (1970)) (holding that "the jury should have been permitted to consider whether unsightliness of the powerline was 'directly injurious' to defendants' property, and thereby affected its market value").

[303] State Dep't of Transp. v. Suit City of Aventura, 774 So. 2d 9, 13–14 (Fla. App. 3d Dist. 2000).

[304] 4 NICHOLS ON EMINENT DOMAIN § 13.22[1], at 13-193. For cases involving loss of visibility, *see* 4 NICHOLS ON EMINENT DOMAIN §§ 13.21 [1], [2], and [3], at 13-186–13-192.

[305] 39 Cal. 4th 507, 139 P.3d 119, 46 Cal. Rptr. 3d 742 (2006), *modified*, 2006 Cal. LEXIS 12176, 2006 Cal. Daily Op. Service 9650 (Cal. 2006) (not affecting the judgment).

[306] *Id.* at 512, 139 P.3d at 121, 46 Cal. Rptr. 3d at 744.

its billboards seen from the adjacent public road."[307] The Supreme Court of California noted that there were categories of "[c]ases discussing whether abutter's rights include a right to maintain the visibility of property adjoining a public way…."[308] As the court explained, some courts recognize a "'right to visibility' in situations in which a private party has obstructed a road or sidewalk so as to substantially impair the visibility of an abutting business's wares or signage."[309] Another category of cases "recognize[s] a compensable visibility interest when government action that includes a partial physical taking of a landowner's property impairs the visibility of its remainder, as seen from the adjacent road."[310] A third category, into which the *Regency* case fell, concerns government action

> having the sole allegedly injurious effect of reducing the visibility of roadside property as seen from the street. The virtually unanimous rule applied in this class of cases provides that any such impairment to visibility does not, in and of itself, constitute a taking of, or compensable damage to, the property in question.[311]

Where loss of visibility is compensable, it has been held that the loss is not a separate element of damages but simply one of the factors that may considered in regard to the highest and best use of the subject property. Thus, in *City of Lee's Summit v. R and R Equities, LLC*,[312] the city appealed from a trial court's judgment awarding $600,000 to the Huffs after a jury trial. At issue in part was loss of visibility and exposure of the property after the city took 4.4 acres of the Huffs' property to widen a road.[313] "The lack of visibility and exposure resulted from the United States Army Corps of Engineers' requiring a buffer zone of vegetation and trees to mitigate the impact that the road's improvement would have on a stream and wetlands on the Huffs' property."[314] Allegedly the taking and the buffer zone reduced the highest and best use of the property from "multi-use or mixed-use development, including high density and low density residential with an emphasis on commercial development…to low density residential."[315]

Although the court reversed the trial court, *inter alia*, because the trial court admitted evidence of a sale of church property as a comparable sale,[316] the court held that the trial court did not err in admitting the Huffs' evidence regarding loss of visibility. The reason was that "[n]one of the witnesses assigned a value to the lost visibility nor were they asked to do so. Rather, they presented it to explain how lost visibility had caused a change in the highest and best use of the property."[317]

The court's decision was based on its analysis of the law regarding loss of visibility only when the loss has a "bearing on the condemned land's highest and best use."[318] The court stated:

> Loss of visibility to a property's passers-by is not itself a compensable item of damage in a condemnation action. This is because such a claim is inextricably related to a non-existent property right in traffic…. Nonetheless, this does not mean that it is of no significance in a condemnation action….

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[307] *Id.* at 517, 139 P.3d at 124, 46 Cal. Rptr. 3d at 748.

[308] *Id.* The court reviewed the principal categories of cases, stating:

> The first and most ancient class of cases involves private parties who place, within or along a street, an obstruction that impairs the visibility of roadside property. Courts have sometimes treated these impediments as akin to nuisances and afforded relief to the abutting landowner. The second and third categories of cases both involve public defendants, and sound in eminent domain or inverse condemnation rather than in nuisance. The second type of dispute involves physical takings of private property, or substantial impairments of the access rights enjoyed by abutting landowners, that also happen to reduce the visibility of the affected private property. In this second scenario, some courts have identified a "right to be seen," regarding the lost visibility as a type of damage associated with the physical taking or loss of access. The third set of cases concerns government action that impairs only the visibility of abutting property, without infringing upon any other recognized property right. In this latter context—typified by the present case—the virtually unanimous rule provides that there is no freestanding right to be seen, and that the government need not pay compensation for any lessened visibility.

Id.

[309] *Id.* at 518, 139 P.3d at 125, 46 Cal. Rptr. 3d at 749 (*citing*, *e.g.*, Bischof v. Merchants' Nat. Bank, 75 Neb. 838, 106 N.W. 996, 997–98 (1906); Perry v. Castner, 124 Iowa 386, 100 N.W. 84, 87 (1904); First Nat. Bank v. Tyson, 133 Ala. 459, 32 So. 144, 150 (1902)).

[310] *Id.* at 519, 139 P.3d at 126, 46 Cal. Rptr. 3d at 750 (*citing* State by Comm'r v. Weiswasser, 149 N.J. 320, 693 A.2d 864, 876 (1997); State by Humphrey v. Strom, 493 N.W.2d 554, 561 (Minn. 1992); 8,960 Sq. Feet v. Dep't of Transp., 806 P.2d 843, 848 (Alaska 1991); State v. Lavasek, 73 N.M. 33, 385 P.2d 361, 364–65 (1963); People v. Loop, 127 Cal. App. 2d 786, 803, 274 P.2d 885 (1954); People v. Ricciardi, 23 Cal. 2d 390, 399, 144 P.2d 799 (1943)); *but see* State v. Schmidt, 37 Tex. Sup. Ct. J. 47, 867 S.W.2d 769, 774 (Tex. 1993).

[311] *Id.* at 520, 139 P.3d at 126, 46 Cal. Rptr. 3d at 750 (*citing*, *e.g.*, Stagni v. State *ex rel*. Dep't of Transp., 812 So. 2d 867, 871 (La. App. 5th Cir. 2002); Moreton Rolleston, Jr. Living Trust v. Dep't of Transp., 242 Ga. App. 835, 531 S.E.2d 719, 722 (2000); Reid v. Jefferson County, 672 So. 2d 1285, 1290 (Ala. 1995); In re Condemnation by Del. River Port Auth., 667 A.2d 766, 768 (Pa. Commw. Ct. 1995); Adams Outdoor Adver. v. Dep't of Transp., 112 N.C. App. 120, 434 S.E.2d 666, 668 (1993); Outdoor Adver. Ass'n of Tenn. v. Shaw, 598 S.W.2d 783, 788 (Tenn. Ct. App. 1980); Filler v. City of Minot, 281 N.W.2d 237, 244 (N.D. 1979); Malone v. Commw., 378 Mass. 74, 389 N.E.2d 975, 979 (1979); Troiano v. Colo. Dep't of Highways, 170 Colo. 484, 463 P.2d 448, 455 (1969); Kansas City v. Berkshire Lumber Co., 393 S.W.2d 470, 474–75 (Mo. 1965); Randall v. City of Milwaukee, 212 Wis. 374, 249 N.W. 73, 76 (1933)).

[312] 112 S.W.3d 38 (Mo. App. W. Dist. 2003).

[313] *Id.* at 40.

[314] *Id.*

[315] *Id.*

[316] *Id.* at 46.

[317] *Id.* at 44.

[318] *Id.*

> "It may be said…that noise and speed, increased traffic and their resulting inconveniences are neither elements of damages nor of benefits and they are not proper matters of proof or for the jury's consideration…. But, …it may with other factors affect future use and therefore market value…."
>
> *[T]he mention of elements that are not separately compensable, including lost visibility, is permissible when they bear on the condemned property's highest and best use….*
>
> Visibility is not a protected property right that is a separately compensable item of damage in a condemnation action. Evidence of lost visibility is proper because of its bearing on the condemned land's highest and best use….[319]

Visibility of an owner's property from the highway is different from the owner's view from the property that may have been obstructed by a highway project. In a 2005 decision by the Colorado Court of Appeals, it appears that loss of visibility of an owner's property from a highway may be a factor to consider with respect to severance damages even if there no reduction in the highest and best use of an affected property. Thus, in *Department of Transportation of Colorado v. Marilyn Hickey Ministries,*[320] the transportation department had taken approximately 10,000 square ft of a church's property. The defendant, also referred to in the opinion as the Happy Church, appealed "the trial court's orders denying damages for loss of visibility of the subject property from Interstate 25 resulting from the construction of a concrete retaining wall…."[321] The Colorado Court of Appeals agreed with the defendant that the trial court "erred in finding that damages resulting from a loss of visibility into the property are not compensable."[322]

> When there is a partial taking of a landowner's property, the landowner is entitled to compensation for injury to the remainder of the property…. When there is a reduction in the property value of the remainder, the property owner should be compensated for "all damages that are the natural, necessary and reasonable result of the taking."[323]

The Colorado Supreme Court saw the matter quite differently and reversed. The court "granted certiorari to determine whether the court of appeals erred in ruling that the landowner, part of whose property is being taken by eminent domain for a state transportation project, may recover damages for the impairment of passing motorists' view of the remainder of the landowner's property."[324] First, the court held that the Court of Appeals erroneously relied on *La Plata Electric Association v. Cummins,*[325] in which the court "held that '[a] property owner should be compensated for all damages that are the natural, necessary and reasonable result of the taking.'"[326] Second, the court ruled that the controlling precedent was *Troiano v. Colorado Department of Highways,*[327] in which the court held that "because a landowner has no continued right to traffic passing its property, the landowner likewise has no right in the continued motorist visibility of its property from a transit corridor."[328]

The court explained that

> a public transit corridor like I-25 is an always evolving multi-modal point of access to a city's transportation infrastructure. The state's police power enables continued modifications to its public transportation systems and the "[r]ight of access is subject to reasonable control and limitation," … "[L]ogically it would be inconsistent" to recognize a right to visibility but no right to have the traveling public pass one's property.[329]

The Colorado Supreme Court also relied on a 2007 decision by the Utah Supreme Court in *Ivers v. Utah Department of Transportation,*[330] in which the court held that "landowners do not have a protected interest in the visibility of their property from an abutting road, even if part of their land has been taken in the process."[331]

Finally, the Colorado Supreme Court observed that the landowner in the *Marilyn Hickey Ministries* case did not

> claim a diminution in aesthetic value because the retaining wall obstructs its view from the remaining property out toward I-25. Nor could it reasonably claim that a view of a busy interstate freeway had any inherent aesthetic value. Rather, the sole basis of its claim is that motorists passing along a narrow 650 foot strip of land have a diminished view of the remainder property. La Plata did not recognize a right to visibility looking in toward one's property. As we stated above, La Plata only involved the loss of aesthetic value when taking an easement for an electric transmission line and all of the resulting damages following from such a taking….The lost visibility claimed by the landowner in Troiano and by the Happy Church is nothing more than an access claim.[332]

It has been held also that diminution in business or loss of sales may not be used to calculate the damages to the remainder for loss of visibility. In *Delaware v. Catawba Associates,*[333] after a taking of the owners' property, the view of the owners' restaurant from the

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[319] *Id.* at 43–44 (citations omitted) (emphasis supplied).

[320] 129 P.3d 1068 (Colo. Ct. App. 2005), *rev'd and remanded*, 159 P.3d 111 (Colo. 2007).

[321] 129 P.3d at 1070.

[322] *Id.*

[323] *Id.* (*quoting* La Plata Elec. Ass'n v. Cummins, 728 P.2d 696, 700 (Colo. 1986)).

[324] DOT of Colo. v. Marilyn Hickey Ministries, 159 P.3d 111, 112.

[325] 728 P.2d 696 (Colo. 1986).

[326] 159 P.3d at 113 (citation omitted).

[327] 170 Colo. 484, 463 P.2d 448 (1969).

[328] 159 P.3d at 113.

[329] *Id.* at 114 (citations omitted).

[330] 2007 UT 19, 154 P.3d 802 (2007).

[331] *Id.* at P12, 154 P.3d at 805.

[332] DOT v. Marilyn Hickey Ministries*,* 159 P.3d at 115 (footnote omitted).

[333] 2005 Del. Super. LEXIS 62 (2005) (Unrept.).

road was partly obstructed.[334] An expert for the owner concluded that the value of the land was reduced because of lower rental value owing to the restaurant's reduced sales after the taking.[335] However, the court held that in Delaware, "[t]he owner is not entitled to compensation for the value of the business conducted on the land taken."[336]

> This rule is based on the fact that the business owner is free to open his or her business in another location, …and this is so even if the business cannot be successfully relocated. Evidence regarding the business is relevant only to the extent that it illustrates one of the uses to which the land may be put.[337]

Thus, the expert's report was inadmissible:

> While Delaware courts have allowed the admission of evidence of pre-taking gross sales to help establish economic rent, they have not permitted the introduction of loss sales after the taking to calculate the residual value of the property….
>
> [T]he owner is not entitled to compensation for the taking or even destruction of the business, because the business is entirely distinct from the market value of the land upon which it is conducted….[338]

In *Regency*, *supra*, the court held that Regency had no right of visibility that required the payment of compensation. Moreover, "Regency cannot claim unfair surprise from the plantings. Local governments have long planted trees along roads for aesthetic reasons…."[339] The *Regency* court observed also that the plantings had not reduced the value of the parcels of land on which the billboards were erected.[340] Although Regency had a property interest separate and apart from the respective owners' interest in the parcels of land, Regency's separate, identifiable property interest did not give rise to a right to compensation.

> Through its lease agreements Regency has acquired a property interest acutely sensitive to impairments to visibility. But as a general matter, "we do not believe that a property owner, confronted with an imminent property regulation, can nullify…a legitimate exercise of the police power by leasing narrow parcels or interests in his property so that the regulation could be characterized as a taking only because of its disproportionate effect on the narrow parcel or interest leased."[341]

F.2. Loss of View

Government action that obstructs the view from an affected property, depending on the circumstances, may constitute a taking.[342]

In *City of Ocean City v. Maffucci,*[343] the defendants owned beachfront duplexes on Wesley Avenue in Ocean City.[344] The city instituted a condemnation action to take an 80 ft strip of beach in front of 2825 Wesley Avenue, in which the Spadaccinos were first floor tenants, to permit the building of new sand dunes. The sand dunes completely obstructed the view of the ocean and eliminated direct access to the beach.[345] The city's expert testified that "because beach view and access rights have no value, loss of riparian (littoral) rights did not devalue the property…. He testified that there is no difference in value between beachfront and non-beachfront property."[346] Needless to say, the defendants' expert disagreed,[347] as did the court.

> [O]cean view, beach access, use and privacy are fundamental considerations in valuing beachfront property.
>
> Indeed every other jurisdiction which has considered this issue has held that loss of view, loss of access, loss of privacy and loss of use are compensable. For example, in *Pierpont Inn, Inc. v. State*, 70 Cal. 2d 282, 74 Cal. Rptr. 521, 449 P.2d 737, 745–46 (1969), *overruled on other grounds*, *Los Angeles County, Metro. Transportation Authority v. Continental Dev. Corp.*, 16 Cal. 4th 694, 66 Cal. Rptr. 2d 630, 941 P.2d 809 (1997), the California Supreme Court held that a property owner's loss of view and access to the beach, resulting from a partial taking for freeway construction, were proper elements of severance damages.[348]

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[334] *Id.* at *2.

[335] *Id.*

[336] *Id.* at *7 (footnotes omitted).

[337] *Id.* (footnotes omitted).

[338] *Id.* at *8 (footnote omitted) (*citing* Ableman v. State, 297 A.2d 380, 383 (Del. 1972); Wilmington Hous. Auth. v. Nos. 312-314 East Eighth Street, 55 Del. 252, 191 A.2d 5, 11 (Del. Super. Ct. 1963)).

[339] Regency Outdoor Adver., Inc., v. City of Los Angeles, 39 Cal. 4th at 522, 139 P.3d at 128, 46 Cal. Rptr. 3d at 752.

[340] *Id.*

[341] *Id.* at 523, 139 P.3d at 128, 46 Cal. Rptr. 3d at 753, (*quoting* Adams Outdoor Adver. v. East Lansing, 463 Mich. 17, 614 N.W.2d 634, 639 (2000)). *See also* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 327, 122 S. Ct. 1465, 1481, 152 L. Ed. 2d 517, 543 (2002) (reiterating that "'taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated").

[342] For cases on loss of view, see 4 NICHOLS ON EMINENT DOMAIN § 13.22[1], [2], and [3], at 13-193–13-197.

[343] 326 N.J. Super. 1, 740 A.2d 630 (1999).

[344] *Id.* at 4, 740 A.2d at 631.

[345] *Id.* at 4, 740 A.2d at 632.

[346] *Id.* at 5, 740 A.2d at 632.

[347] *Id.* at 14, 740 A.2d at 637.

[348] *City of Ocean City*, 326 N.J. at 19–20, 740 A.2d at 641 (footnote omitted). *See also* the following cases cited in the opinion: Butler v. State, 973 S.W.2d 749, 757 (Tex. App. 3d Dist. 1998) (holding that landowners, part of whose property was taken for construction of approach lanes to an elevated highway, could receive compensation for the diminution in value of the remaining property caused by creation of an unattractive "aesthetic view" from the remainder of the property); Tiffany v. Town of Oyster Bay, 234 N.Y. 15, 136 N.E. 224, 225 (1992) (stating that "rights of reasonable, safe, and convenient access to the water…commonly belong to riparian ownership"); Bd. of Trustees of Internal Improvement Trust Fund v. Sand Key Assocs. 512 So. 2d 934, 936 (Fla. 1987) (holding that riparian and littoral rights include "the right of access to the water" and "the right to an unobstructed view of the water"); State *ex rel*. State Highway Comm'n v. Hesselden Inv. Co., 84 N.M. 424,

As one authority states, "[i]t generally appears that a loss of view is a factor to consider in awarding compensation if there has been a partial taking of the landowner's property."[349] However, "[m]any courts have denied compensation for loss of view when (1) none of the landowner's property was taken, and (2) the public improvement involved a highway,"[350] in part because "parties purchasing land adjacent to public roadways should anticipate that future development…may impair their view."[351]

G. MISCELLANEOUS

G.1. Privacy and Security

An owner's privacy and security that are reduced as a result of a taking are normally taken into consideration only to the extent they are included in the diminution in value to the remainder.[352] There is, however, some authority holding that if a property is a special use property that is dependent upon privacy and security then loss of privacy and security, may be allowed as a separate item of damage to show a reduction of the property's highest and best use for that purpose, even to the extent that the loss renders the remainder almost valueless.[353]

G.2. Spatter

So-called spatter damage, i.e., snow, slush, and ice being spattered onto the landowner's remaining property, is normally considered to be a general damage, i.e., one shared in common with other property owners; however, a landowner may be able to show that such damage is unique to the affected property.[354]

G.3. Fear

Certain types of takings can cause landowners who occupy the remaining property to be fearful as a result of the use of the easement acquired.[355] Unless a fear is based on provable fact generally believed by the public, it appears that the courts do not consider fear as an element of damage because it is too remote and speculative.[356] However, there is some authority for permitting evidence of fear if there is a general public fear of subsequent problems that will be caused, for example, by the improvement, such as electromagnetic fields causing health problems.[357] It has been held that if the element of fear is to be admitted, it is only one factor to be considered and is not to be given an independent value of its own.[358]

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504 P.2d 634, 637 (1972) (holding that loss of view, impaired ingress and egress, and circuitous indirect access were compensable consequential elements of damages on partial taking); Dennison v. State, 22 N.Y.2d 409, 293 N.Y.S.2d 68, 239 N.E.2d 708, 710–11 (1968) (holding that it was proper when a taking of a portion of land for highway resulted in loss of privacy, seclusion, and view to consider traffic noise, lights, and odors as factors in determining the decrease in the value to the remaining property); S.C. State Highway Dep't v. Touchberry, 248 S.C. 1, 148 S.E.2d 747, 749–50 (1966) (holding that plaintiff's loss of view of his farmland and loss of breeze to the remainder of the property, are compensable severance damages after a partial taking); Thiesen v. Gulf, F. & A. Ry. Co., 75 Fla. 28, 78 So. 491, 501 (1917) (stating that "[t]he common-law riparian proprietor enjoys [the] right [of ingress and egress], and that of unobstructed view over the waters, and in common with the public the right of navigating, bathing, and fishing")).

[349] 4 NICHOLS ON EMINENT DOMAIN § 13.22[2], at 13-194.

[350] *Id*. § 13.22[3], at 13-197.

[351] *Id*.

[352] Trustees of Boston Univ. v. Commonwealth, 286 Mass. 57, 62, 64–65, 190 N.E. 29 (1934).

[353] Newton Girl Scout Council v. Mass. Turnpike Auth., 335 Mass. 189, 138 N.E.2d 769 (1956).

[354] State of Mo., *ex rel*. State Highway Comm'n v. Franchise Realty Interstate, 577 S.W.2d 925 (Mo. App. W. Dist. 1979).

[355] Annotation, *Fear of Powerline, Gas or Oil Pipeline or Related Structure in Easement Condemnation Proceeding*, 23 A.L.R. 4th 631 (1983).

[356] Ne. Gas Transmission Co. v. Tersana Acres, 144 Conn. 509, 134 A.2d 253 (1957).

[357] W. Farmers Elec. Co-op v. Enis, 1999 Ok. Civ. App. 111, 993 P.2d 787 (2d Div. 1999).

[358] *Id.* at *15, 16, 993 P.2d at 793 (remanding for a new trial).