

Notes

Inverse Condemnation and the Right of Access of Abutting Property Owners

I. INTRODUCTION

The theory of inverse condemnation provides a remedy where the state takes or injures property of another or takes or injures rights which accrue to property without compensation.¹ The remedy of inverse condemnation is procedurally similar to an action of eminent domain.² However, in an inverse condemnation suit, the positions of the respective parties are reversed; the property owner is the plaintiff, and the governmental entity is the defendant.³ While a court action precedes the taking in eminent domain, the damages or taking in inverse condemnation occur before the commencement of a court action.⁴ The actions are otherwise similar. Valuation of the injury or taking in inverse condemnation and eminent domain is as of the date of the taking

¹U. S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation.")

²"It is now well settled law in . . . the United States that when private property is taken by eminent domain, the owner of the property is constitutionally entitled to compensation." 3 NICHOLS ON EMINENT DOMAIN § 8.1(2), at 6 (3d ed. J. Sackman & R. Van Brunt 1975) [hereinafter cited as NICHOLS], citing *United States v. Klamath & Moadoc Tribes*, 304 U.S. 119 (1938); *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330 (1934); *United Ry. & Elec. Co. v. West*, 280 U.S. 234 (1929); *Phelps v. United States*, 274 U.S. 341 (1927). See also *State v. Reid*, 204 Ind. 631, 185 N.E. 449 (1933); *General Outdoor Advertisement Co. v. City of Indianapolis*, 202 Ind. 85, 157 N.E. 309 (1930) (removal of billboard was not a nuisance per se and compensation must be paid).

³Under the theory of eminent domain, the sovereign has the right, acting in the public interest, to force the owner of property to sell the same to the public. Kucera, *Eminent Domain Versus Police Power—A Common Misconception*, 1959 INSTITUTE ON EMINENT DOMAIN 21. Since eminent domain is an inherent power of the sovereign, the sovereign may grant it to whomsoever it may think proper, including public service corporations. IND. CODE § 32-11-3-1 (Burns 1973).

⁴Arnebergh, *Recent Developments in the Law of Inverse Condemnation*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 319 (1974).

⁵*Id.*

or injury.⁵ Compensation in both inverse condemnation and eminent domain is monetary damages.⁶

The inverse condemnation theory traditionally applied only in cases involving a direct taking.⁷ This theory developed into an application to the taking of rights to property and, in more recent years, continued to expand into other areas not involved with the actual taking of land.⁸ The principal application of this

⁵6 NICHOLS § 25.41(2), at 25-22 to 25-24.

⁶"Compensation as used in the constitutional provision as a limitation upon the power of eminent domain implies a full and complete equivalent, usually monetary, for the loss sustained by the owner whose land has been taken or damages." 3 NICHOLS § 8.6, at 43, *citing* United States v. Miller, 317 U.S. 369, 373 (1943); United States v. Klamath & Moadoc Tribes, 304 U.S. 119 (1938).

⁷In its early stages, inverse condemnation, or reverse condemnation as it is often termed, was frequently characterized as a "de facto" or "common law" taking. 6 NICHOLS § 25.41(2), at 25-22. The reason for this characterization was the self-executing character of the constitutional provisions which gave rise to this type of action. *Id.*; 3 *id.* § 8.1(2), at 11. This traditional view of inverse condemnation required a "physical entry"; however, the modern trend is to relax this prerequisite. 29A C.J.S. *Eminent Domain* § 110, at 442 n.22 (1965) (there need not be a physical taking of the property or even dispossession; any substantial interference with the elemental rights growing out of ownership of private property is considered a taking).

⁸Inverse condemnation of airspace.—the taking of airspace of superadjacent landowners—and application of inverse condemnation had its beginnings in 1946. In *Causby v. United States*, 328 U.S. 256 (1946), the United States Supreme Court recognized that invasion of airspace was in the same category as invasion of the surface. The Court blended trespass and nuisance doctrines and applied them via the inverse condemnation theory. In *Griggs v. Allegheny County*, 369 U.S. 84, 89 (1962), the Court reinforced the *Causby* decision and took the position that the governmental airport authority was liable for damages and not the owners of the aircraft. As a limitation upon inverse condemnation of airspace, most courts have insisted that there be an actual physical trespass before damages can be awarded.

In *Jankovich v. Indiana Toll Rd. Comm'n*, 379 U.S. 487 (1965), the Supreme Court held that the decision of the Indiana Supreme Court in *Indiana Toll Rd. Comm'n v. Jankovich*, 244 Ind. 574, 193 N.E.2d 237 (1963) that special zoning of property adjacent to airports under the guise of police power was a taking of rights under the state constitution and that the owners must therefore be compensated, rested upon adequate state grounds and therefore the Court was deprived of jurisdiction to review the judgment. See Russell, *Recent Developments in Inverse Condemnation of Airspace*, 39 J. AIR L. & COM. 81, 97-98 (1973). See generally Arnebergh, *supra* note 3; Neal, *Airspace—Air Easements*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 309 (1975); Sackman, *Air Rights—A Developing Prospect*, NINTH INSTITUTE ON EMINENT DOMAIN 1 (1969); Kline, *The SST and Inverse Condemnation*, 15 VILL. L. REV. 887 (1970); Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 DICK. L. REV. 207 (1967); *Inverse Condemnation* 40 J. AIR. L. & COM. 332-41 (1974).

Inverse condemnation of personal property.—the United States Supreme

theory is to rights of adjacent property owners, often referred to as the area of "abutter's rights." This Note will focus upon the adjacent property owner's right of access to adjoining highways. For this purpose, an "abutter" is an owner of land which adjoins either an existing highway or land taken for highway purposes. Depending upon many variables, such an abutter may have many rights or easements which grow out of the abutting relationship. Most authorities are in agreement that rights of an abutter generally include, but are not limited to, those of access, light and air, view, and lateral support.¹⁰ These rights, along with whatever other rights which may exist in the particular jurisdiction, may be divided into two general areas: those rights which the abutter shares with the public in general, and those rights which are special and peculiar to the abutter's particular parcel of property.¹¹

II. GENERAL CONCEPTS

A. State Constitutional Provisions: Taking vs. Damaging

State constitutional provisions pertaining to compensation in eminent domain actions are the starting point for an understanding of inverse condemnation theory. These constitutional provisions

Court held in *Armstrong v. United States*, 364 U.S. 40 (1960), that the fifth amendment of the Constitution protects both real and personal property. In *Armstrong*, the Court found that the taking of a ship under construction on which there were materialmen's liens deprived the lienholders of compensable property, and they were entitled to recovery based upon the taking of personal property. Arnebergh, *supra* note 3, at 325.

A very unique but unsuccessful attempt to apply inverse condemnation may be found in *Leger v. Louisiana Dept. of Wildlife & Fisheries*, 306 So. 2d 391 (La. Ct. App. 1975). The plaintiff in *Leger* was a farmer who had suffered the loss of a crop of sweet potatoes due to wild deer. In his unsuccessful suit against the state, the plaintiff alleged that the deer, property of the state, had entered his land and taken, without compensation, rights existing upon it.

⁹The reasons for applying the doctrine of inverse condemnation to the rights of adjacent property owners are: the damage to property, if reasonably foreseeable, would normally entitle owners to compensation; property owners do incur direct damages to their property; public works will not be stifled because of liability for direct damages to property; the cost of such damages to property are better absorbed by the taxpaying public; and, if the owners of damaged property are left uncompensated, they would be contributing more than their share to public undertakings. Arnebergh, *supra* note 3, at 322. See also *Albers v. County of Los Angeles*, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965).

¹⁰2 NICHOLS § 5.72(1), at 5-154 to -155.

¹¹Sackman, *Access—A Problem in Liability*, FOURTH ANNUAL INSTITUTE ON EMINENT DOMAIN 1, 5 (1962).

are of two types:¹² those allowing compensation for a "taking" of property,¹³ and those allowing compensation for a "taking or damaging" of property.¹⁴

In states which have constitutional clauses providing for compensation for "taking or damaging," the courts are more likely to allow payment for mere injury to property.¹⁵ Such jurisdictions generally make no distinction between damages to remainders by partial taking and damages to abutting property owners.¹⁶ Other states, such as Indiana,¹⁷ with constitutional pro-

¹²2 NICHOLS § 6.1(3), at 6-19. See also Hannett, *Problems of Access in Eminent Domain*, NINTH INSTITUTE ON EMINENT DOMAIN 119, 123 (1969).

¹³New York is a primary example of a state with a "taking" clause in its constitutional provision pertaining to eminent domain. N.Y. CONST. art. I, § 6. The leading case in New York is *Sauer v. City of New York*, 180 N.Y. 27, 72 N.E. 579 (1904), *aff'd*, 206 U.S. 536 (1907), in which the New York court held that a property owner with land abutting property taken in eminent domain had no easement of ingress and egress when such easement conflicted with the public's rights as to a highway; therefore the abutting property owner could not recover for a taking of such easement. See also *Bopp v. State*, 19 N.Y.2d 368, 280 N.Y.S.2d 135, 227 N.E.2d (1967); *Selig v. State*, 10 N.Y.2d 34, 217 N.Y.S.2d 33, 176 N.E.2d 59 (1961); *Northern Lights Shopping Center, Inc. v. State*, 20 App. Div. 2d 415, 247 N.Y.S.2d 333 (1964). In recent years the courts of New York have allowed recovery of damages where an abutting landowner is denied suitable access. See *Priestly v. State*, 23 N.Y.2d 152, 295 N.Y.S.2d 659, 242 N.E.2d 827 (1968); *County of Onondaga v. White*, 36 App. Div. 2d 439, 321 N.Y.S.2d 305 (1971); *Airport Lodge of Rochester, Inc. v. Brooks-Buell Inc.*, 323 N.Y.S.2d 894 (Sup. Ct. 1971) (discussion of application of damages). See also 2 NICHOLS § 6.1(3), at 6-19; 4A *id.* § 14.1(1), at 14-6; Sackman, *Access—A Reevaluation*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 335, 350-62 (1974) (discussion of abutter's rights in New York).

¹⁴The first state to adopt a "taking and damage" clause in its constitution was Illinois in 1870. ILL. CONST. art. I, § 13 (1870). The first application of the damage clause was in the landmark case of *Rigney v. City of Chicago*, 102 Ill. 64 (1882), which allowed inverse condemnation proceedings for the taking of incorporeal rights. See also *Chicago v. Taylor*, 125 U.S. 161 (1888); *Chapman v. Staunton*, 246 Ill. 394, 92 N.E. 905 (1910); *Shrader v. Cleveland Ry.*, 242 Ill. 227, 89 N.E. 997 (1909); *Aldrich v. Metropolitan W. Side Elevated R.R.*, 195 Ill. 456, 63 N.E. 155 (1902); *Chicago N. Shore St. Ry. v. Payne*, 192 Ill. 239, 61 N.E. 467 (1901); *Citizens Utilities Co. v. Metropolitan Sanitary Dist.*, 322 N.E.2d 857 (Ill. Ct. App. 1974); *Cuneo v. City of Chicago*, 292 Ill. App. 235, 11 N.E.2d 16 (1937) (diversion of business not compensable element of damages). See also Sackman, *Access—A Reevaluation*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 335, 341 (1974).

¹⁵Sackman, *Access—A Reevaluation*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 335, 336 (1974).

¹⁶Sackman, *supra* note 11, at 32-33.

¹⁷IND. CONST. art. 1, § 21.

Compensation for services or property.—No man's particular services shall be demanded, without just compensation. No man's property shall be taken by law, without just compensation; nor, except in

visions providing for compensation only for "taking," are more conservative in their awarding of damages to abutting property owners.¹⁸

Generally, under a constitutional provision providing compensation in the event of a "taking," the rights of an abutting owner are not considered to be of such an absolute character that he can resist or prevent any and all detrimental interference with the street.¹⁹ The abutter's rights will not prevent a municipality from controlling, regulating, or improving the street in the public interest, even though it appears that the privileges which the abutter previously had enjoyed and the benefits he had derived from the street in its existing condition will be curtailed or impaired by the proposed change.²⁰ However, under the constitutional provisions providing for compensation in the event of a "taking," a dichotomy exists between those rights an abutter shares with the public generally and those rights which accrue to him alone, since only the latter are considered "property."²¹ When such rights are considered "property" in the constitutional sense, they cannot be destroyed without compensation.²² In Indiana, an abutter generally may be allowed compensation when he has suffered an injury to a right in his land that is special and peculiar from the injury to the general public, or when the abutter has been denied "reasonable access."²³

Under the constitutional and statutory provisions for compensation in the event of "taking or damage," the abutter's rights are generally considered of such a nature as to be strictly pro-

case of the State, without such compensation first assessed and tendered.

¹⁸Although the Indiana Constitution provides for compensation only when there is a "taking" of property, most Indiana Code provisions pertaining to eminent domain allow compensation for damaging of property rights. See IND. CODE §§ 8-1-8-1, 8-3-5-1 (Burns 1973); *id.* § 8-3-12-4 (Burns Supp. 1974); *id.* §§ 8-3-13-2, 8-4-1-16, 8-11-1-1 to -11, 8-13-2-1 to -14, 8-15-2-7, 8-17-12-8 (Burns 1973); *id.* §§ 32-11-1-1 to -13, 32-11-2-1 to -6, 32-11-3-1 to -3, 32-11-4-1 to -5, 32-11-5-1 (Burns 1973).

¹⁹2A NICHOLS § 6.444(1), at 6-198.

²⁰*Id.*

²¹2 *id.* § 6.444(1), at 5-155 to -163.

²²In Indiana the abutter has several forms of relief. The Indiana Constitution affords an aggrieved property owner a common law suit against a governmental entity for a common law taking. IND. CONST. art. 1, § 21. Also statutory and case law in Indiana allow proceedings which may be referred to as an action in inverse condemnation for a non-physical taking. See *State v. Geiger & Peters, Inc.*, 245 Ind. 143, 196 N.E.2d 740 (1964); IND. CODE § 32-11-1-12 (Burns 1973).

²³*State v. City of Terre Haute*, 250 Ind. 613, 238 N.E.2d 459 (1968).

tected.²⁴ In such cases, the abutting owner will be compensated whenever his rights are interfered with. The only difficulty is in distinguishing between rights of the public and the rights of the abutter in the street which are appurtenant to his abutting land. For example, the right to use the street as an avenue of travel, while it may be enjoyed by the abutting landowner more frequently than by other citizens, is nonetheless a public right.²⁵ Criteria for determining whether a right is public or private include the following: Whether the relative position of the abutter's land and the abutting way has been changed; whether the abutter has access to the way; whether the passage along the way has been obstructed in such a way as to seriously impair accessibility to the premises; whether the way is used for other than street purposes; and whether the light and air from the way has been materially obstructed.²⁶

B. Police Power: Its Effects on Inverse Condemnation Relating to Abutter's Rights

Eminent domain is not the only state power that directly affects property or property rights. Concurrent with a state's power of eminent domain is its police power. The concept of "police power" is one which has escaped a solid definition.²⁷ Gen-

²⁴2A NICHOLS § 6.4432(2), at 6-179 (to recover damages the claimant need not establish that the public work constitutes a nuisance or that the work was negligently accomplished).

²⁵*Id.* at 6-199.

²⁶*Id.* at 6-199 to -200.

²⁷The Supreme Court of the United States has recognized the difficulty in defining "police power." In *Berman v. Parker*, 348 U.S. 26, 32 (1954), the Court stated:

An attempt to define its [police power's] reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition.

See also *California State Ass'n v. Maloney*, 341 U.S. 105, 110 (1961); *Lincoln Union v. Northwestern Co.*, 335 U.S. 525 (1948); *Olsen v. Nebraska*, 313 U.S. 236 (1940).

However, the Court has applied the familiar standard of reasonableness in assessing application of such power. *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962).

The Court has also set somewhat nebulous criteria for determining whether police power is reasonable.

To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interest of the public . . . require[s] such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Lawton v. Steele, 152 U.S. 133, 137 (1894).

erally, police power is the sovereign's power to govern its members so as to secure and promote the public welfare.²⁸ This may be done by restraint and compulsion.²⁹ When police power is exercised upon property, it involves the "regulation" of such property to prevent its use in a manner that is detrimental to the public interest.³⁰ If the property owner suffers injury as a result of an exercise of the police power, the injury is said to be *damnum absque injuria*.³¹ The regulation of property must be fluid to meet the ever-changing and expanding demands of the public. The limitation placed upon police power is, therefore, the test of "reasonableness."³² When police power exceeds its limitation of reasonableness, the property owner may be entitled to compensation.³³ Unreasonableness may be presumed when the benefit to the public is negligible when compared with the detriment to the owner.³⁴

While both police power and eminent domain may involve property and property rights, they are conceptually different. When police power is exercised within the legitimate limit of reasonableness, no compensation is required.³⁵ Eminent domain on the other hand recognizes a right to compensation.³⁶ Confusion may result where police power, like eminent domain, is used to actually take property or property rights. When police power, within its regulatory function, is used to take property, the property or property right is destroyed.³⁷ When eminent domain is exercised to take property or property rights, such property or property rights are "used" by the public.³⁸ Many states have

²⁸1 NICHOLS § 1.42, at 1-105.

²⁹Kucera, *Eminent Domain Versus Police Power—A Common Misconception*, 1959 INSTITUTE ON EMINENT DOMAIN 1.

³⁰1 NICHOLS § 1.42, at 1-104.

³¹*Id.* at 1-109 (the abutter has suffered no injury because he is compensated for the damages by sharing in the general benefits to the public which the regulations are intended and calculated to secure). See also Sackman, *Access—A Reevaluation*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 335 (1974).

³²Sackman, *The Impact of Zoning and Eminent Domain upon Each Other*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 107, 116 (1971). See also 1 NICHOLS § 1.42(7), at 1-153 to -165; Kucera, *supra* note 29, at 4.

³³1 NICHOLS § 1.42(1), at 1-114 (actual appropriation of property for the public use is an act of eminent domain).

³⁴Sackman, *The Impact of Zoning and Eminent Domain upon Each Other*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 107, 117 (1971) (zoning as a segment of police power should not inflict great financial losses when the benefit to the public is negligible).

³⁵Kucera, *supra* note 29, at 7.

³⁶*Id.*

³⁷29 C.J.S. *Eminent Domain* § 6, at 178 (1965). See *School Town v. Heiney*, 178 Ind. 1, 98 N.E. 628 (1912); Kucera, *supra* note 29, at 5.

³⁸Kucera, *supra* note 29, at 5.

avoided the confusion of determining whether injury to property or property rights was caused by eminent domain or police power by statutorily providing for compensation to abutting landowners when their property rights are taken or destroyed, regardless of the source of the injury.³⁹

One exercise of police power that may affect property or property rights is zoning. Valid zoning restrictions may cause damage to property or property rights, but the property owner is not entitled to compensation.⁴⁰ Zoning is not a taking but only a regulation of property to prevent use detrimental to the public.⁴¹ As with other exercises of the police power, zoning is subject to the limitation of "reasonableness."⁴² A zoning ordinance will be considered valid and enforceable if its constitutionality is merely debatable.⁴³ In considering whether a zoning ordinance is unreasonable and thus unconstitutional, the courts look to a number of factors: the existing uses and zoning of nearby property; the extent to which property values vary; the extent to which the destruction of property values of the land owner promotes the health, safety, morals, or general welfare of the public; the relative gain to the public as compared to the hardship imposed upon the individual property owner; the suitability of the property for the zoned purpose; and the length of time the property has been vacant as zoned, considered in the context of land development in the vicinity of the subject property.⁴⁴

The issue of reasonableness of zoning frequently arises in two areas. If zoning is used to terminate a present use at a future time, often termed "timed zoning," the proposed zoning must not be arbitrary.⁴⁵ If the zoning in this context is arbitrary, there exists a "taking" of property, and the owner of such property

³⁹IND. CODE § 8-11-1-1 to -11 (Burns 1973). In at least one instance, Indiana statutorily recognizes that the rights of access, air, light, and view are property rights, and if such are "taken" by police power, the owner is entitled to compensation. *Id.* § 8-13-2-9. Texas has made provisions for compensation when property is taken by police power. Kucera, *supra* note 29, at 14.1.

⁴⁰1 NICHOLS § 1.42(10), at 1-189; See also Sackman, *The Impact of Zoning and Eminent Domain upon Each Other*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 107 (1971).

⁴¹Sackman, *The Impact of Zoning and Eminent Domain upon Each Other*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 107 (1971).

⁴²*Id.* at 116.

⁴³*Id.* at 117. See also 1 NICHOLS § 1.42(10), at 1-218, *citing* La Salle Nat'l Bank v. County of Cook, 12 Ill. 40, 145 N.E.2d 65 (1957).

⁴⁴1 NICHOLS § 1.42(10), at 1-219.

⁴⁵*Id.* at 1-207.

is entitled to compensation.⁴⁶ Another situation in which zoning may be unreasonable is where it is not feasible to use the land as it is zoned. If all statutory prerequisites for a variance have been met and there is a denial of a variance, there will be a "taking" under the constitutional definition.⁴⁷

In addition to the limitation of reasonableness, a condemnor may not use zoning as a device to depress land values shortly before such land is to be condemned.⁴⁸ This device is often termed "condemnation blight" and will be discussed in a later section of this Note.⁴⁹

C. Damages in Inverse Condemnation

The area involving compensation for the taking or injuring of property is filled with the misuse of damage terms and concepts.

1. *Use of the Term Damages.*—Damages, when used in the constitutional taking of land, involve the paying of compensation to the owner for the value of his land.⁵⁰ Unfortunately, the definition of damages for a constitutional taking of land has been confused with the definition of damages used in connection with tort liability.⁵¹

A problem exists particularly with the use of the term "consequential damages." If viewed in the purest sense, all damages are consequential.⁵² However, as defined by the Indiana Supreme Court, the legal definition of consequential damages is "damages, loss, or injury as do not flow directly and immediately from the act of the party, but only from some of the consequences or results of such acts."⁵³ Unfortunately, the term is used interchangeably

⁴⁶*Id.* at 1-207 to -208, *citing* Kunz v. Waterman, 258 Ind. 573, 283 N.E.2d 371 (1972); Metropolitan Bd. of Zoning Appeals v. Sheehan Constr. Co., 313 N.E.2d 78 (Ind. Ct. App. 1974).

⁴⁷1 NICHOLS § 1.42(10), at 1-219 to -220, *citing* Kunz v. Waterman, 258 Ind. 573, 283 N.E.2d 371 (1972); Metropolitan Bd. of Zoning Appeals v. Sheehan Constr. Co., 313 N.E.2d 78 (Ind. Ct. App. 1974).

⁴⁸1 NICHOLS § 1.42(10), at 1-221. *See also* Sackman, *supra* note 41, at 121. The Indiana Supreme Court has stated that where zoning is used to appropriate property for a specific purpose, there is a taking in a constitutional sense and compensation must be paid. Indiana Toll Rd. Comm'n v. Jankovich, 244 Ind. 574, 193 N.E.2d 237 (1963), *cert. dismissed*, 379 U.S. 487 (1965). *See also* State v. Geiger & Peters, Inc., 245 Ind. 143, 196 N.E.2d 740 (1964).

⁴⁹*See* text accompanying notes 86-103 *infra*.

⁵⁰3 NICHOLS § 8.6, at 43.

⁵¹Kucera, *supra* note 29, at 28. Tortious damages on the other hand involve a wrong as an assessment of liability as well as all mitigating factors.

⁵²2A NICHOLS § 6.4432, at 6-171.

⁵³Elson v. City of Indianapolis, 246 Ind. 337, 346, 204 N.E.2d 857, 862 (1965).

for the whole spectrum of damages, thus rendering the term of little use in any study of damages to property.⁵⁴ For the purpose of discussion, this Note will use the term "direct" damages as those damages directly arising out of an injury and the term "consequential" damages as those which are indirect and which may be too far removed to be computable. Generally, where there is a "direct" injury to land, such as by a depreciation in value, compensation must be paid for the injury.⁵⁵ However, compensation for speculative or for consequential damage is generally not allowed.⁵⁶

Although an early Indiana case allowed recovery of consequential damages consisting of loss of profits,⁵⁷ the case is now doubtful authority.⁵⁸ Presently, under Indiana law, the courts are reluctant to allow consequential damages in any area.⁵⁹

2. *The Concept of Setoff.*—Setoff consists of those factors which mitigate the amount of damages recoverable by the landowner.⁶⁰ When determining whether setoff will be applied against a landowner's compensation for a taking or injuring of property, a distinction is drawn between "general" and "special" benefits to the property.⁶¹ General benefits are those benefits that the landowner shares with the public,⁶² while special benefits are those that are special and peculiar to the landowner's particular parcel of land.⁶³ Although in most situations "general" benefits cannot be set off,⁶⁴ "special" benefits can be set off without violating the constitutional mandate providing for "just compensation."⁶⁵

When the Indiana legislature originally enacted the Eminent Domain Act in 1905, no setoff for benefits of any nature was allowable, except in those limited instances where municipal corporations were involved.⁶⁶ However, when the Eminent Domain

⁵⁴2A NICHOLS § 6.4432, at 6-171.

⁵⁵*Id.* at 6-167.

⁵⁶4A *id.* § 14.245, at 14-252 to -254.

⁵⁷State v. Stabb, 226 Ind. 319, 79 N.E.2d 392 (1948).

⁵⁸See State v. Jordan, 247 Ind. 361, 366, 215 N.E.2d 32, 35 (1966).

⁵⁹See, e.g., State v. Heslar, 257 Ind. 307, 274 N.E.2d 261 (1971); Indiana & Mich. Elec. Co. v. Whitley County R.E.M. Corp., 312 N.E.2d 503 (Ind. Ct. App. 1974).

⁶⁰3 NICHOLS § 8.62, at 57.

⁶¹*Id.* § 8.6205, at 84.

⁶²*Id.* § 8.6203, at 66-68.

⁶³*Id.*

⁶⁴*Id.* § 8.6205, at 86-88, citing State v. Brubeck, 204 Ind. 1, 170 N.E. 81 (1932).

⁶⁵3 NICHOLS § 8.6205, at 86.

⁶⁶Act of Feb. 27, 1905, ch. 48, § 6, amended Act of Feb. 23, 1935, ch. 76, § 3. See Cleveland, Cincinnati & St. L. Ry. v. Smith, 192 Ind. 674, 138 N.E. 347 (1923); State v. Brubeck, 204 Ind. 1, 170 N.E. 81 (1932) (municipal corporations).

Act was amended in 1935, setoff for damages became allowable in certain situations.⁶⁷ As in almost all other states, Indiana now adheres to the general principle in allowing setoff for special benefits.⁶⁸

The terms "direct" and "consequential" damages and "setoff" also change distinctively when they are applied to total takings of property, partial takings of property, and situations where no actual taking occurs.

When there is a total taking, the owner will be able to recover the value of his land.⁶⁹ The payment for the value of the property is considered just compensation, and the owner usually will not be entitled to consequential damages.⁷⁰ Because the taking is constitutionally proscribed, the elements of setoff and mitigating circumstances are generally not allowed.⁷¹ In Indiana, a landowner's compensation is the fair market value of the parcel taken, plus the value of each separate estate or interest in the parcel, plus the fair market value of all improvements pertaining to that realty.⁷²

When there is a partial taking, the owner may not only recover for the actual taking but also may recover for damages occurring to the area remaining in his ownership, possession, and use.⁷³ These damages to the remainder are often termed "severance" damages.⁷⁴ The purported reason for allowing severance damages is that a partial taking is an exception to the "no consequential damages" rule in total takings.⁷⁵ The allowance for setoff is generally allowable only against the direct damages for the land taken.⁷⁶ Early Indiana statutory law did not provide setoff

⁶⁷The 1905 Act only allowed municipal corporations to assert setoff. However the 1935 amendment to the 1905 Act entitled the state, the county for public highway purposes, and municipal corporations for public use to assert setoff allowances. Act of Feb. 23, 1935, ch. 76, § 3, p. 230 (codified at IND. CODE § 32-11-1-6(5) (Burns 1973)). Only special benefits may be set off. *State v. Smith*, 237 Ind. 72, 143 N.E.2d 666 (1957).

⁶⁸3 NICHOLS § 8.6211(15), at 120.

⁶⁹*Id.* § 8.6, at 43.

⁷⁰4A *id.* § 14.1(1), at 14-6 (no consequential damages under "taking provisions"). See *City of Kokomo v. Mahan*, 100 Ind. 242 (1884). However, interest from the time of taking is considered an element of just compensation and is recoverable. *State Highway Comm'n v. Blackiston Land Co.*, 301 N.E.2d 663 (Ind. Ct. App. 1973).

⁷¹*Cf.* 3 NICHOLS § 8.62(2), at 60.

⁷²IND. CODE § 32-11-1-6 (Burns 1973).

⁷³4A NICHOLS § 14.1(3), at 14-31.

⁷⁴*Id.* at 14-33 (diminution in value of a remainder area by reason of severance therefrom of the parcel appropriated demands compensation).

⁷⁵4A NICHOLS § 14.2, at 14-46.

⁷⁶3 *id.* § 8.6211(15), at 120.

for severance damages.⁷⁷ However, many courts felt that a setoff allowance should be made when severance damages were sought.⁷⁸ In Indiana, setoff is allowed against the consequential damages to the remainder area and not against the direct damages for the land taken.⁷⁹

Where no actual taking of land is present but the land is damaged, recovery is based upon many variables. The primary factor is the nature of the state constitutional provisions and whether such provisions allow compensation for a "taking" or for a "taking or injuring."⁸⁰ A "taking and injuring" provision entitles the abutter only to damages that are peculiar to the abutter and not shared by the general public, except where other damages are specifically provided for by constitution or statute.⁸¹ Set-off of special benefits is almost universally allowed.⁸²

In states such as Indiana whose constitutions mandate compensation by finding that the nonpossessory special property rights of an abutter are "property" in the constitutional sense,⁸³ many authorities believe a "taking" occurs when a benefit passes to the public, as opposed to the destruction of a right with no benefit to the public.⁸⁴ When compensation is allowed, most states including Indiana, provide for setoff in the assessment of damages.⁸⁵

⁷⁷See Act of Feb. 27, 1905, ch. 48, § 6. See *State v. Brubeck*, 204 Ind. 1, 170 N.E. 81 (1932).

⁷⁸See *State v. Reid*, 204 Ind. 631, 635, 185 N.E. 449, 450 (1932).

⁷⁹3 NICHOLS § 8.6211(15), at 120.

⁸⁰4A *id.* § 14.1(1), at 14-6.

⁸¹2A *id.* § 6.45, at 6-312.

⁸²3 *id.* § 8.6210, at 106.

⁸³*School Town v. Heiney*, 178 Ind. 1, 98 N.E. 628 (1912) (a taking is an actual interference with or disturbance of property rights, not merely consequential). See generally 2 NICHOLS § 5.72(1), at 5-155 to -163; 29A C.J.S. *Eminent Domain* § 105(2), at 429 (1965). Indiana, as most other states with only a constitutional provision providing for compensation for a "taking" of property, holds that "property rights" are property in the constitutional sense. See *Weldon v. State*, 258 Ind. 143, 279 N.E.2d 554 (1972); *State v. Lovett*, 254 Ind. 27, 257 N.E.2d 298 (1970); *State v. Marion Circuit Court*, 238 Ind. 637, 153 N.E.2d 327 (1958); *Huff v. Indiana State Highway Comm'n*, 238 Ind. 280, 149 N.E.2d 299 (1958); *Burkam v. Ohio & M. Ry.*, 122 Ind. 344 (1889); *Ross v. Thompson*, 78 Ind. 90 (1881); *City of Cannelton v. Lewis*, 123 Ind. App. 473, 11 N.E.2d 899 (1953). An award of compensation is dependent upon a court finding that a "taking of property" occurred and this determination is within the court's discretion. Indiana allows the factfinder the determination of whether there has been a taking of property. 2 NICHOLS § 5.72(1), at 5-165; *Sackman*, *supra* note 11, at 18-19. See also *Beck v. State*, 256 Ind. 318, 268 N.E.2d 746 (1971).

⁸⁴See, e.g., L. ORGEL, *ORGEL ON VALUATION UNDER EMINENT DOMAIN* § 3, at 14 (2d ed. 1953).

⁸⁵IND. CODE § 32-11-1-6 (Burns 1973).

3. *Time of Taking.*—The determination of the “time of taking” of the property also poses a problem in the damage area. Traditionally, compensation for a taking in both eminent domain actions and inverse condemnation actions has been assessed at the date of taking, or more specifically the date of the filing of the action.⁸⁶ By statute, Indiana fixes the time for assessing compensation for the actual taking of land in eminent domain actions at the time notice is served on the landowner.⁸⁷ By Indiana statute and case law, the time for assessing compensation in inverse condemnation cases is also fixed as the date of service of notice.⁸⁸

In recent years, the time of assessing compensation has been questioned. As expansive condemnation programs are announced with regularity, a phenomenon called “condemnation blight” has occurred. Condemnation blight occurs when there are decreases in the values of properties in the area of an eminent domain project after the designation of land to be taken by the project.⁸⁹ Because individuals do not wish to make long-term use of property that they know will be taken by eminent domain, the property sits vacant, the income-producing ability declines, and the value of the property decreases. What may be termed a de facto taking has occurred between the announcement of the project and the actual date of taking.⁹⁰

When confronted with the problem of condemnation blight, the United States Supreme Court held that eminent domain actions by the federal government must exclude any depreciation in value caused by the prospective taking, measured from the date the Government was committed to the project.⁹¹ Many states are still grappling with the problem by legislation or judicial decision.

⁸⁶3 NICHOLS § 8.5(1), at 27-28. See generally 3 *id.* § 8.5(1)-(4).

⁸⁷IND. CODE § 32-11-1-6 (Burns 1973). See *Schnull v. Indianapolis Union Ry.*, 190 Ind. 572, 131 N.E. 51 (1921); *Fort Wayne & S.W. Traction Co. v. Fort Wayne & W. Ry.*, 170 Ind. 49, 83 N.E. 665 (1908).

⁸⁸IND. CODE § 32-11-1-12 (Burns 1973). See *Elson v. City of Indianapolis*, 246 Ind. 337, 204 N.E.2d 857 (1965); *State Highway Comm'n v. Blackiston Land Co.*, 301 N.E.2d 663 (Ind. Ct. App. 1973).

⁸⁹See generally Dillon, *Condemnation Blight: Uncompensated Losses in Eminent Domain Proceedings—Is Inverse Condemnation The Answer?*, 3 PAC. L.J. 571 (1972).

⁹⁰Arnebergh, *supra* note 3, at 324. See also Sackman, *Condemnation Blight—A Problem in Compensability and Value*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 157 (1973) (discussion of distinction between de facto taking and condemnation blight).

⁹¹*United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 636 (1961), discussed in Dillon, *supra* note 89, at 584-85. See also Stubbs, *The Date of Take—What Happened To It and What Affects It*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 261 (1975).

California is one state which has confronted the problem of condemnation blight with statutory provisions. California, like many other states with expansive public construction projects, became inundated with the problem of inverse condemnation cases pertaining to the decrease in property values prior to an actual taking in eminent domain.⁹² With public works projects so extensive as to require preparation years in advance of the actual initiation of a program, the California courts not only were faced with a possible "taking" of property in a constitutional sense, but also with the inherent unfairness of allowing property to depreciate to such a low value that the public projects were in essence being financed by the individual property owners directly affected. The tragedy of the situation manifested itself in the fact that the parties displaced were often of a low socio-economic status, which rendered them least likely to resist the taking, let alone bear the loss to their property.

Finally in 1971, an effort was made to rectify this situation and to construct the framework for uniform inverse condemnation suits dealing with damages precipitated by the announcement of a project.⁹³ The California legislature passed a statute that allows for a suit for compensation in damages when a public entity, including "the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation"⁹⁴ having the power of eminent domain, establishes by resolution or ordinance the necessity to acquire particular parcels of land, and fails to initiate action within 6 months thereafter.⁹⁵ If action is not initiated within 6 months, an inverse condemnation action may be initiated by the owner of the parcel to require the taking of such parcel and payment of compensation.⁹⁶ These provisions not only provide just compensation for the landowner but allow the condemning entity the flexibility of revising or rescinding its plans within a 6-month period.

Pennsylvania has faced the complex ground of pre-taking damages through judicial decision. Under the Pennsylvania Constitution, compensation is allowable only when there is a "taking."⁹⁷ However, municipal corporations vested with the power of eminent

⁹²*Klopping v. City of Whittier*, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972). The California court held that a physical entry was not required. Although finally resolved subsequent to the 1971 statutory provisions, the case originated prior to the legislative enactments.

⁹³CAL. CIV. PRO. CODE § 1243.1 (West 1972).

⁹⁴CAL. GOV'T. CODE § 811.2 (West 1966).

⁹⁵CAL. CIV. PRO. CODE § 1243.1 (West 1972).

⁹⁶*Id.*

⁹⁷PA. CONST. art I, § 10.

domain must compensate for injuries to land as well as for a mere taking.⁹⁸ As early as 1915, the Pennsylvania courts recognized that municipal corporations were liable for damages even when no taking occurred.⁹⁹ With the enactment of the Eminent Domain Code of 1964,¹⁰⁰ the state was placed on a par with other condemners and the next progression in liability was easily made. In *Commonwealth's Crosstown Expressway Appeal*,¹⁰¹ the court logically extended the compensation for damages in nontaking eminent domain cases by corporations to state eminent domain proceedings which, after announcement for the need of particular tracts of land, had unreasonably delayed the actual condemnation proceedings. The court reasoned that the condemnor had unreasonably delayed the taking of the particular parcels and such delay had unjustly and substantially diminished the value of the property to be taken.

The Indiana courts have not yet faced the problem of assessing damages in either eminent domain proceedings or inverse condemnation prior to the time of notice of eminent domain actions. However, Indiana statutory law allowing for the announcement of long range eminent domain projects¹⁰² may lead entities possessing the power of eminent domain into the problem of condemnation blight. In *Indiana Toll Road Commission v. Jankovich*,¹⁰³ the Indiana Supreme Court held that the use of zoning to acquire airspace rights from property is a "taking" in the constitutional sense and compensation must be paid. Since it is arguable that there is little or no distinction between a taking by zoning prior to condemnation and condemnation blight, it seems likely that blight condemnation damages will be a feature of future Indiana law.

III. THE ABUTTER'S RIGHT OF ACCESS TO ADJOINING ROADS AND HIGHWAYS

While the foregoing general factors influence inverse condemnation as it effects the rights of abutting landowners, there

⁹⁸PA. CONST. art. X, § 4.

⁹⁹In *Re Philadelphia Parkway*, 250 Pa. 257, 95 A. 429 (1915).

¹⁰⁰PA. STAT. ANN. tit. 26, §§ 1-101 to -903 (Supp. 1974).

¹⁰¹3 Pa. Commonwealth Ct. 1, 281 A.2d 909 (1971), noted in 46 TEMP. L.Q. 139 (1972).

¹⁰²IND. CODE § 8-13-7-1(b) (Burns 1973). The Indiana State Highway Commission must publish its estimated plans two fiscal years in advance.

¹⁰³244 Ind. 574, 193 N.E.2d 237 (1963), cert. dismissed, 379 U.S. 487 (1965). See note 48 *supra*. In *Art Neon Co. v. City & County of Denver*, 357 F. Supp. 466, 480 (D. Colo. 1973), the court stated: "Where the ordinance prohibits any use or where it prohibits all reasonable uses, there is a taking, and the Fifth Amendment comes into play and demands the payment of just compensation."

are special problems which directly affect the abutter to roads and highways.

A. *Defining the Abutter's Right of Access*

The "right to access" or "easement of access," as it was often termed, originated in early times when no fencing was present and travelers could traverse the countryside freely.¹⁰⁴ As civilization progressed and the need for improved roadways became apparent, landowners joined together and constructed their own roadways. These roads often became private "toll roads."¹⁰⁵ By the early 1900's, it could be stated that the right to access by an abutting owner was an incident to the land.¹⁰⁶ When property for highways was taken in early eminent domain actions, the taking went no further than an appropriation of the use, thus leaving the owner with the fee and rights incidental to that fee.¹⁰⁷ Therefore, as it exists today in many jurisdictions, the right of access is one incident to the land and protected by the court, rather than a right created by the court and subject to its discretion.¹⁰⁸ Such "easements of access" constitute property in the constitutional sense and require compensation when taken.¹⁰⁹ Even if the public takes the fee of the highway, most courts have held that property abutting the street has attached to it the easements of access, light, and air.¹¹⁰

In early Indiana case law, the courts held that the abutter owned the fee to the center of the road, subject to the easement of the highway, and therefore could use the public right of way so long as such use did not interfere with the public's enjoyment of the highway.¹¹¹ When the state began to acquire the fee in

¹⁰⁴Hannett, *Problems of Access in Eminent Domain*, NINTH INSTITUTE ON EMINENT DOMAIN 119 (1969).

¹⁰⁵*Id.*

¹⁰⁶*Id.* at 120.

¹⁰⁷*Id.* at 121. See *Lostutter v. City of Aurora*, 126 Ind. 436, 26 N.E. 184 (1891); *Town of Rensselaer v. Leopold*, 106 Ind. 29, 5 N.E. 761 (1886); *Ross v. Thompson*, 78 Ind. 90 (1881); *Huffman v. State*, 21 Ind. App. 449, 52 N.E. 713 (1899).

¹⁰⁸Hannett, *supra* note 104, at 121. See IND. CODE § 32-11-1-1 (Burns Supp. 1975).

¹⁰⁹2 NICHOLS § 5.72(1), at 5-155 to -163; 29A C.J.S. *Eminent Domain* § 105(2), at 429 (1965). See *State v. Marion Circuit Court*, 238 Ind. 637, 153 N.E.2d 327 (1958); *Huff v. Indiana State Highway Comm'n*, 238 Ind. 280, 149 N.E.2d 299 (1958); *City of Cannelton v. Lewis*, 123 Ind. App. 473, 11 N.E.2d 899 (1953).

¹¹⁰3 NICHOLS § 10.222(2), at 369, *citing Decker v. Evansville Ry.*, 133 Ind. 493, 33 N.E. 349 (1892); *Haslett v. New Albany R.R.*, 7 Ind. App. 603, 34 N.E. 845 (1893).

¹¹¹*E.g. Huffman v. State*, 21 Ind. App. 449, 52 N.E. 713 (1899). See also

highways, the abutter's rights of access and of light, air, and lateral support were firmly entrenched.¹¹²

Although the abutter's *right* of access is not an issue today, the *amount* of access to which the abutter is entitled is an issue. In the early years, road systems were primitive, and abutting owners had access to all points abutting a road.¹¹³ After the invention of the automobile, public interest and safety increasingly demanded that access to well-traveled, high-speed roads be limited.¹¹⁴ The abutting owner found that his right to access at all points of his land adjoining the road had to give way for the benefit of the public.¹¹⁵ With public safety in mind, courts began to hold that an abutter was entitled to "reasonable access" instead of complete access.¹¹⁶ Although the abutter's right of access may be reasonably regulated in the public interest, regulation cannot be used for total deprivation of access without the state incurring liability for damages.¹¹⁷ If an abutting owner is denied access reasonably necessary for the enjoyment of his land, he is entitled to relief.¹¹⁸

If the abutter must travel a greater distance to reach his property, this inconvenience, known as circuitry of travel,¹¹⁹ is not compensable, so long as ample access to the abutter's land re-

Town of Ogden Dunes v. Wildermuth, 142 Ind. App. 379, 235 N.E.2d 73 (1968).

¹¹²Weldon v. State, 258 Ind. 143, 279 N.E.2d 554 (1972); State v. Lovett, 254 Ind. 27, 257 N.E.2d 298 (1970); Huff v. Indiana State Highway Comm'n, 238 Ind. 280, 149 N.E.2d 299 (1958); Burkan v. Ohio & M. Ry., 122 Ind. 344 (1889); Ross v. Thompson, 78 Ind. 90 (1881).

¹¹³Hannett, *supra* note 104, at 119.

¹¹⁴*Id.* at 126-27.

¹¹⁵2 NICHOLS § 5.72(1), at 5-164; Stubbs, *Access Rights of an Abutting Landowner*, FIFTH ANNUAL INSTITUTE ON EMINENT DOMAIN 59, 80 (1963). See also Sauer v. City of New York, 206 U.S. 536 (1907). Generally, "[a]n owner of land abutting upon a public highway possesses an easement of access to the abutting highway at all points included within his frontage on such highway." Stubbs, *supra*, at 63-64. However, the abutter's right is subordinate to the right of passage of the public and is subject to reasonable regulation and restriction. *Id.* at 80. See also State v. Ensley, 240 Ind. 472, 164 N.E.2d 342 (1960); State v. Marion Circuit Court, 238 Ind. 637, 153 N.E.2d 327 (1958); Huff v. Indiana State Highway Comm'n, 238 Ind. 280, 149 N.E.2d 299 (1958).

¹¹⁶Moore, *Nature and Compensability of Access*, THIRD ANNUAL INSTITUTE ON EMINENT DOMAIN 1, 10 (1961). See Beck v. State, 256 Ind. 318, 268 N.E.2d 746 (1971).

¹¹⁷3 NICHOLS § 10.221(5), at 376-77.

¹¹⁸Sackman, *supra* note 11, at 20, citing United States v. Grizzard, 219 U.S. 180 (1911); Stubbs, *Access Rights of an Abutting Landowner*, FIFTH ANNUAL INSTITUTE ON EMINENT DOMAIN 59, 82 (1963).

¹¹⁹Hannett, *supra* note 104, at 126.

mains.¹²⁰ This is because the abutter suffers the same inconvenience as the general public, although to a greater degree.¹²¹

The courts in Indiana have echoed this development of the right of access and now hold that the abutter is only entitled to "reasonable access;"¹²² thus mere circuitry of travel is not compensable.¹²³ In Indiana, as in most states, compensation will only be afforded to those abutters who have either suffered an injury special and peculiar from that of the general public, or who have been denied reasonable access.¹²⁴

An abutter with a right of access is entitled to the actual enjoyment of that access. If the use of the street adjoining the abutter's property substantially deprives that abutter of the enjoyment of his easement, there has been a taking of his property rights.¹²⁵ A clear example of the use of a street interfering with the enjoyment of an abutter's easements to that street arose in *Eubank v. Yellow Cab Co.*¹²⁶ An Indianapolis city ordinance¹²⁷ allowed taxi cab companies to establish "cab stands" on the street immediately in front of the plaintiff's property. The constant noise, fumes, and disturbances detrimentally affected the plaintiff's business. The Indiana Court of Appeals held that since adjacent property owners had a right of access to the street, interferences with the right had to be compensated. The court stated that devoting the street to private purposes, in this case a cab stand, was a deprivation of the abutter's rights for which compensation must be paid. However, if a private street is taken for public purposes without interfering with the enjoyment of the abutter's easements, most courts hold that only nominal damages may be awarded.¹²⁸

¹²⁰2 NICHOLS § 5.72(1), at 5-165. The taking of a preponderance of access, as long as ample access is left, is deemed to be a benefit to the public and a proper exercise of police power. Sackman, *supra* note 15, at 348. The question of ample access, however, is one of fact and therefore relegated to the factfinder. *Beck v. State*, 256 Ind. 318, 268 N.E.2d 746 (1971); Sackman, *supra* note 11, at 18-20.

¹²¹Hannett, *supra* note 104, at 126-27 (when everyone is required to travel further, there exists a public inconvenience). *See State v. Hastings*, 246 Ind. 475, 206 N.E.2d 874 (1965).

¹²²*State v. Hastings*, 246 Ind. 475, 482, 206 N.E.2d 874, 877 (1965).

¹²³*Id.*

¹²⁴*State v. City of Terre Haute*, 250 Ind. 613, 618-19, 238 N.E.2d 459, 462 (1968).

¹²⁵2 NICHOLS § 5.72(6), at 5-173 to -174. *See State v. Stefaniak*, 250 Ind. 631, 238 N.E.2d 451 (1958); *Brown v. State*, 211 Ind. 61, 5 N.E.2d 527 (1937).

¹²⁶84 Ind. App. 144, 149 N.E. 647 (1925).

¹²⁷City of Indianapolis, Ind., Ordinance 12, Jan. 15, 1923.

¹²⁸Sackman, *supra* note 11, at 15-16.

*B. Problem Areas in the Abutter's Right to
Access to Adjoining Roads and Highways*

1. *Change of Grade.*—A change of grade of a street, resulting in either a raising or lowering of the street, is deemed an application of state police power to improve the street for the benefit of the public.¹²⁹ Consequently, the abutting owner is not entitled to compensation for damages to his premises by reason of the change of grade¹³⁰ unless there has been a partial taking, in which case the rules applicable to partial taking apply.¹³¹ The reasons for noncompensation for a changing of the grade of a street have been expressed as threefold: (1) There may be a damaging of property, but there is no actual taking (in those states which do not have "damage" clauses in their constitutions); (2) the right to change the street was paid for in the original taking; and (3) the governmental body is doing no more with the street than a private adjoining landowner could do with his land.¹³² Since the abutter's easements to light, view, and access are subordinate to the rights of the public, there is no compensation for infringement upon them by a change of grade.¹³³

The purpose of the change of grade need not be for improvement or safety of the street; rather it may be for the crossing of a railroad, or access to a bridge.¹³⁴ The weight of authority holds that even the removal of lateral support in cases of change of grade is not compensable.¹³⁵

¹²⁹2A NICHOLS § 6.4441, at 6-198; 5 *id.* § 16.1013(1), at 16-45, *citing* *State v. Ensley*, 240 Ind. 472, 164 N.E.2d 342 (1960).

¹³⁰2A NICHOLS § 6.4441, at 6-198 to -199; 5 *id.* § 16.1013(1), at 16-45. *See* *Young v. State*, 252 Ind. 131, 246 N.E.2d 377, *cert. denied*, 396 U.S. 1038 (1969); *Brown v. State*, 211 Ind. 61, 5 N.E.2d 527 (1937); *State v. Patten*, 209 Ind. 482, 199 N.E. 577 (1936); *Morris v. City of Indianapolis*, 177 Ind. 369, 94 N.E. 705 (1911); *City of Valparaiso v. Adams*, 123 Ind. 250, 24 N.E. 107 (1890); *Davis v. City of Crawfordsville*, 119 Ind. 1, 21 N.E. 449 (1888); *Town of Rensselaer v. Leopold*, 106 Ind. 29, 5 N.E. 761 (1885); *City of Kokomo v. Mahan*, 100 Ind. 242 (1884); *Town of Princeton v. Gieske*, 93 Ind. 102 (1883); *City of Wabash v. Alber*, 88 Ind. 428 (1882); *City of Aurora v. Fox*, 78 Ind. 1 (1881); *Weis v. City of Madison*, 75 Ind. 241 (1881); *City of Terre Haute v. Turner*, 36 Ind. 522 (1871); *Baker v. Town of Shoals*, 6 Ind. App. 319, 33 N.E. 664 (1893).

¹³¹2A NICHOLS § 6.4441(1), at 6-207.

¹³²*Sackman*, *supra* note 11, at 30. *See also* 5 NICHOLS § 16.1013(1), at 16-47.

¹³³2A NICHOLS § 6.4441(3), at 6-212.

¹³⁴*Id.* § 6.4441(6), at 6-215 to -217. *See* *Morris v. City of Indianapolis*, 177 Ind. 369, 94 N.E. 705 (1911) (grade was lowered for railroad crossing).

¹³⁵2A NICHOLS § 6.4441(6), at 6-218, *citing* *City of Aurora v. Fox*, 78 Ind. 1 (1881), and *City of Delphi v. Evans*, 36 Ind. 90 (1871). *See* *Freigy v. Gararo Co.*, 223 Ind. 342, 60 N.E.2d 288 (1945) (no compensation for loss of lateral support absent negligence in construction).

An area of particular hardship exists for those abutters who erect buildings to conform to the grade of the street and then are injured when such grade is changed.¹³⁶ If there are no statutory provisions for the compensation in this situation, the abutter will have no remedy.¹³⁷

An exception to the general rule denying compensation for injury caused by a change of grade exists where the injury is to a right special and peculiar to the abutter.¹³⁸ Although the cases pertaining to recovery for special injuries have split, some authorities think that the key to recovery for injuries sustained in a change of grade is whether the abutter owns the fee in the street.¹³⁹ In Indiana the general rule prevails: abutting property owners have no right to compensation for a change of grade in the street.¹⁴⁰ Although an early Indiana statute provided for compensation for change of grade,¹⁴¹ at present no statutes exist for compensation to an abutter for a change of grade not negligently done.¹⁴²

One author has stated that a cogent argument can be made for distinction between the change of grade from an established grade and a change of grade from an unimproved road. Only in the latter case would the abutter not be entitled to compensation because he should have expected that a grade would be established on an unimproved road sometime in the future.¹⁴³

¹³⁶See *Morris v. City of Indianapolis*, 177 Ind. 369, 94 N.E. 705 (1911).

¹³⁷2A NICHOLS § 6.4441(4), at 6-214 to -215. Indiana has no provisions for such compensation.

¹³⁸*Id.* § 6.4441(10), at 6-233, citing *State v. Ensley*, 240 Ind. 472, 164 N.E.2d 342 (1960); 5 *id.* § 16.1013(3), at 16-51. See also 30 C.J.S. *Eminent Domain* § 446, at 602.

¹³⁹2A NICHOLS § 6.4441(3), at 6-214.

¹⁴⁰*Brown v. State*, 211 Ind. 61, 5 N.E.2d 527 (1937); *State v. Patten*, 209 Ind. 482, 199 N.E. 577 (1936); *Randall v. Board of Comm'rs*, 77 Ind. App. 320, 131 N.E. 776 (1921); *Butler v. City of Kokomo*, 62 Ind. App. 519, 113 N.E. 391 (1916).

¹⁴¹Act of March 14, 1867, ch. 15, § 27 (obsolete).

¹⁴²The 1867 statute, *id.*, allowed compensation for a change of grade from an established grade. However, the statute applied only to cities, *City of Valparaiso v. Adams*, 123 Ind. 250, 24 N.E. 107 (1890), and not to towns, *City of Wabash v. Alber*, 88 Ind. 428 (1882); *Baker v. Town of Shoals*, 6 Ind. App. 319, 33 N.E. 664 (1893).

In 1911 provisions for compensation for a change of grade from an established grade were retained; however first, second, and third class cities were excepted. Ch. 221, § 1, [1911] Ind. Acts 539 (repealed 1969). Finally, in 1969, all previous statutes pertaining to change of grade compensation were repealed and superseded, with no such provisions existing today. IND. CODE § 19-8-16-39 (Burns 1974), *repealing* Act of March 11, 1911, ch. 221, § 1, [1911] Ind. Acts 539.

¹⁴³Sackman, *supra* note 11, at 33-34.

2. *Obstructions in the Highway.*—Although in most cases the general public may not maintain an action for an obstruction in the highway,¹⁴⁴ the abutter has a special interest and may recover for such obstructions.¹⁴⁵ Because an obstruction is a denial of access to an abutting owner, he has suffered a special injury.¹⁴⁶ Therefore, if a portion of a street is discontinued in front of the abutter's property so that access is impossible, he will be entitled to compensation.¹⁴⁷ However, it is an established principle that for an abutting property owner to recover for an obstruction or discontinuance of a street, his property must abut that part of the way which is discontinued or obstructed.¹⁴⁸ Furthermore, because recovery is based upon the premise that the abutter has suffered a special injury, the injury must be different from that of the general public.¹⁴⁹ Damages that are suffered by the public at large are normally never considered peculiar to an abutting owner.¹⁵⁰

¹⁴⁴The general public may prosecute for a public wrong. 3 NICHOLS § 10.221, at 362.

¹⁴⁵*id.* § 10.221, at 362, *citing* O'Brien v. Central Iron & Steel Co., 158 Ind. 218, 63 N.E. 302 (1902); Cannelton v. Lewis, 123 Ind. App. 473, 111 N.E.2d 899 (1953). *See also* Indiana, B. & W. Ry. v. Eberle, 110 Ind. 542 (1886); Robinson v. Thraikill, 110 Ind. 117 (1886); City of Indianapolis v. Kingsbury, 101 Ind. 200 (1884).

¹⁴⁶2A NICHOLS § 6.4442(1), at 6-246, *citing* Brandenburg v. Hittel, 16 Ind. App. 224, 37 N.E. 329 (1894). Indiana allows recovery if the abutter has suffered a special injury. State v. Diamond Lanes, Inc., 251 Ind. 520, 242 N.E.2d 632 (1968). An improper use or obstruction of a street is a taking in the constitutional sense and requires compensation. 3 NICHOLS § 10.221(2), at 369, *citing* Decker v. Evansville, S. & N. Ry., 133 Ind. 493, 33 N.E. 349 (1892); Haslett v. New Albany R.R., 7 Ind. App. 603, 34 N.E. 845 (1893).

¹⁴⁷2A NICHOLS § 6.4442(1), at 6-246, *citing* Brandenburg v. Hittel, 16 Ind. App. 224, 37 N.E. 329 (1894). *See also* 39 C.J.S. *Highways* § 143, at 1085 (1944); Sackman, *supra* note 11, at 8.

¹⁴⁸2A NICHOLS § 6.4442(1), at 6-250.

¹⁴⁹*id.* § 10.221, at 362, *citing* O'Brien v. Central Iron & Steel Co., 158 Ind. 218, 63 N.E. 302 (1902); City of Cannelton v. Lewis, 123 Ind. App. 473, 111 N.E.2d 899 (1952). *See also* Young v. State, 252 Ind. 131, 246 N.E.2d 377, *cert. denied*, 396 U.S. 1038 (1969); Northern Ind. Pub. Serv. Co. v. Vesey, 210 Ind. 338, 200 N.E. 620 (1936); Martin v. Marks, 154 Ind. 549, 57 N.E. 249 (1900); Pittsburgh, C., C. & St. L. Ry. v. Noftsgar, 148 Ind. 101 (1897); People's Gas Co. v. Tyner, 131 Ind. 277 (1891); Dwenger v. Chicago & Grand Trunk Ry., 98 Ind. 153 (1884); Powell v. Bunker, 91 Ind. 64 (1883); Cummins v. City of Seymour, 79 Ind. 491 (1881).

¹⁵⁰Caito v. State, 301 N.E.2d 376 (Ind. Ct. App. 1973). However, Indiana appears to maintain a delicate balance between police power and recovery of special injuries. State v. Ensley, 240 Ind. 472, 164 N.E.2d 342 (1960). The latter is always subject to negation by the former.

Although states are in conflict as to whether there may be recovery for "temporary" injury to abutting property,¹⁵¹ most states, including Indiana, hold that there can be no recovery for mere temporary inconvenience.¹⁵² However, where the abutter suffers a special injury, different in kind and degree from the general public, no sound reason exists to bar recovery.¹⁵³ Damages have been awarded in some jurisdictions to an abutter if the project causing the temporary obstruction is delayed for an extended time because of negligence or unreasonable, unnecessary, arbitrary, or capricious acts or conduct by the one responsible for the obstruction.¹⁵⁴

A distinction between "permanent" and "temporary" obstructions is also made in assessing damages for an obstruction: the former is determined by the difference in value of the property with and without the obstruction; the latter is determined by the diminution in value of use of the land for the time period.¹⁵⁵ If the abutter has no remedy at law and if he has not been estopped, some courts have allowed the abutter to enjoin a wrongful use of a highway which resulted in special injuries to him because of an interference with his right of access.¹⁵⁶

An anomaly arises if the street is obstructed or discontinued at some point beyond the property of the abutter, or the flow of traffic is restricted by an obstruction at some point beyond the abutter's property. In these situations, the abutter may be damaged to a greater extent than the general public. Nevertheless, most courts still tend to treat this type of blockage separately¹⁵⁷ and hold that the abutter is not entitled to compensation if his property is otherwise accessible.¹⁵⁸ There is no right to compensation for an abutter left on a street with only one opening, referred

¹⁵¹Compare *Steinle v. City of Cincinnati*, 142 Ohio St. 550, 53 N.E.2d 800 (1944), with *Youngquist v. Hall*, 195 Minn. 79, 261 N.W. 874 (1935).

¹⁵²29A C.J.S. *Eminent Domain* § 113, at 462 (1965). See also *Papp v. City of Hammond*, 248 Ind. 637, 230 N.E.2d 326 (1967); *Sackman*, *supra* note 11, at 25, citing *Transportation Co. v. Chicago*, 99 U.S. 635 (1879).

¹⁵³2A NICHOLS § 6.4442(2), at 6-251.

¹⁵⁴*Id.* at 6-252 to -253.

¹⁵⁵39 C.J.S. *Highways* § 143, at 1086 (1944).

¹⁵⁶*Id.* at 1087. See *Lake Erie & W. R.R. v. Town of Boswell*, 137 Ind. 336, 36 N.E. 1103 (1894); *City of Kokomo v. Mahan*, 100 Ind. 242 (1884); *Burton v. Sparks*, 109 Ind. App. 531, 36 N.E.2d 962 (1941); *Michigan Cent. R.R. v. Hammond, W. & E.C. Elec. Ry.*, 42 Ind. App. 66, 83 N.E. 650 (1908); *Lake Erie & W. R.R. v. Essington*, 27 Ind. App. 291, 60 N.E. 457 (1901) (cases involving interference of access by railroads).

¹⁵⁷2A NICHOLS § 6.4441(1), at 6-247 to -248.

¹⁵⁸See *id.* § 6.4443(3), at 6-257 to -258, citing *State v. Hastings*, 246 Ind. 475, 206 N.E.2d 874 (1965); *State v. Tolliver*, 246 Ind. 319, 205 N.E.2d 672 (1964); *Dantzer v. Indianapolis Union Ry.*, 141 Ind. 604, 39 N.E. 223 (1895).

to as a "cul-de-sac," even if there is a depreciation in the value of his property.¹⁵⁹ However, impressed by the hardship of not allowing damages when the obstruction is not in front of an abutter's property, some courts have awarded damages for depreciation in value of an abutter's property left on a cul-de-sac.¹⁶⁰ The Indiana courts that have allowed recovery for the cul-de-sac situation appear to have blended "special" injury and "denial of access" to develop recovery for denial of the access for any special purposes for which the property may be used.¹⁶¹ The test to determine damages for the cul-de-sac situation in Indiana generally requires an obstruction of the nearest intersection, or an obstruction that materially impairs access to the property, and specific injuries, different in kind and degree from that suffered by the public, which actually depreciate the market value of the property.¹⁶²

3. *Traffic Controls.*—Diversion of traffic,¹⁶³ installation of a median strip,¹⁶⁴ limitations as to modes and types of traffic, institution of one-way streets, installation of curbs or guardrails, and regulation of access by control of driveway permits or restrictions on parking and deliveries are all exercises of police power, and abutters are not entitled to compensation for damages because of the institution of such measures.¹⁶⁵ The resulting injury or circuity of travel is *damnum absque injuria*,¹⁶⁶ with the abutter entitled to damages only if "ample" access were denied him.¹⁶⁷

¹⁵⁹2A NICHOLS § 6.4443(3), at 6-263, citing *O'Brien v. Central Iron & Steel Co.*, 158 Ind. 218, 63 N.E. 302 (1902). See *State v. Diamond Lanes, Inc.*, 251 Ind. 520, 242 N.E.2d 632 (1968); *State v. Ensley*, 240 Ind. 472, 164 N.E.2d 342 (1960) (the abutter has no access beyond that which is necessary).

¹⁶⁰Sackman, *supra* note 11, at 10, citing *O'Brien v. Central Iron & Steel Co.*, 158 Ind. 218, 63 N.E. 302 (1902).

¹⁶¹*State v. Tolliver*, 246 Ind. 319, 205 N.E.2d 672 (1965) (the abutting owner of a steel prefabricating plant was allowed to recover for being left on a cul-de-sac because the access remaining to his property could not accommodate the length and weight of his steel trucks). See also *State v. Geiger & Peters, Inc.*, 245 Ind. 143, 196 N.E.2d 740 (1964).

¹⁶²2A NICHOLS § 6.4443(3), at 6-268; Sackman, *supra* note 11, at 21. See *State v. Tolliver*, 246 Ind. 319, 205 N.E.2d 672 (1965).

¹⁶³2A NICHOLS § 6.4443(4), at 6-274, citing *State v. Diamond Lanes, Inc.*, 251 Ind. 520, 242 N.E.2d 632 (1968). See *State v. Chervis*, 153 Ind. App. 451, 287 N.E.2d 777 (1972).

¹⁶⁴2A NICHOLS § 6.4443(4), at 6-274, citing *Young v. State*, 252 Ind. 131, 246 N.E.2d 377, *cert. denied*, 396 U.S. 1038 (1969). See *State v. Ensley*, 240 Ind. 472, 164 N.E.2d 342 (1960).

¹⁶⁵2A NICHOLS § 6.4443(4), at 6-274 to -294.

¹⁶⁶Sackman, *supra* note 15, at 335; Sackman, *supra* note 11, at 36, citing *State v. Ensley*, 240 Ind. 472, 164 N.E.2d 342 (1960).

¹⁶⁷*State v. Diamond Lanes, Inc.*, 251 Ind. 520, 242 N.E.2d 632 (1968).

4. *Limited Access Highways*.—Indiana statutory law defines a limited access highway “as a highway or street especially designed for through traffic, and over, from, or to which owners or occupants of abutting land [have] only a limited right or easement of direct access, light, air, or view by reason of the fact that their property abuts upon such limited access facility or for any other reason.”¹⁶⁸

The distinction between conventional highways and limited access highways revolves around one basic theme. “While in the conventional public highway the abutter possesses private rights of ingress and egress, light, air, and access, distinct from those possessed by the public at large, no such rights are appurtenant to property of an abutter upon a limited access highway.”¹⁶⁹

An examination of the problems created by limited access highways upon abutter’s property should be divided into two areas: that in which a limited access highway is located on a new location and that in which a limited access highway is located on existing roads and highways. If a limited access road is constructed where no road existed before, the abutter may not recover damages by reason of lack of access to the new facility because no such right or easement existed before.¹⁷⁰ Although “severance” damages to the remainder of abutter’s property in a partial taking may be allowed,¹⁷¹ no such compensation will be paid if no right to access existed prior to the taking. If an abutter had a right to access on a street prior to its conversion into a limited access facility, denying such abutter “reasonable access” is a taking in the constitutional context and must be compensated.¹⁷²

Although a service road is provided with the limited access facility, many jurisdictions, including Indiana, hold that compensation may be obtained for abutters deprived of ingress and egress.¹⁷³ However, these jurisdictions place two restrictions upon awarding damages for denial of access: the injury suffered must be special and peculiar,¹⁷⁴ and mitigation will be allowed due to

¹⁶⁸IND. CODE §§ 8-11-1-1 to -11 (Burns 1973). See also 3 NICHOLS § 10.2211(2), at 386.

¹⁶⁹Jahr, *Compensable Damages Due To Construction of Limited Access Highways*, SECOND ANNUAL INSTITUTE ON EMINENT DOMAIN 77, 79 (1960).

¹⁷⁰3 NICHOLS § 10.2211(4), at 393; Jahr, *supra* note 169, at 85; Sackman, *supra* note 11, at 14.

¹⁷¹Jahr, *supra* note 169, at 83.

¹⁷²3 NICHOLS § 10.2211(1), at 381, *citing* State v. Geiger & Peters, Inc., 245 Ind. 143, 196 N.E.2d 740 (1964). See also Hannett, *supra* note 104, at 130.

¹⁷³3 NICHOLS § 10.2211(3), at 387, *citing* State v. Geiger & Peters, Inc., 245 Ind. 143, 196 N.E.2d 740 (1964).

¹⁷⁴Young v. State, 252 Ind. 131, 246 N.E.2d 377, *cert. denied*, 396 U.S. 1038 (1969).

the access to the service road.¹⁷⁵ By statute in Indiana, compensation may be paid for access, view, and light if property is obtained for limited access highways.¹⁷⁶ It also appears from case law that damages will be paid for a taking of access only if there is a denial of "reasonable" access needed for a specific purpose for which the property is used,¹⁷⁷ or the abutter suffers some special damages because of access to the service road.¹⁷⁸

C. *Two Unusual Areas Which Affect Abutter's Rights*

One unusual area affecting abutter's rights is that of partial takings. A partial taking, by its effect, creates an abutting property owner where there is a remainder. Traditionally, this "created" abutting property owner has been given a wider array of remedies than the "general" abutting property owner. When part of the tract of land is taken by eminent domain, just compensation to the owner includes damages to the remainder of the tract.¹⁷⁹ The accepted view is that the constitutional requirement for "just compensation" for "taking" includes, by inference, damage to the whole for any part taken.¹⁸⁰ Because of this treatment given to "partial takings," most courts have not been reluctant to award compensation for "access" when egress and ingress from the remainder area to the nearest highway has been rendered difficult.¹⁸¹ However, this liberal attitude in granting compensation has not been extended to general inaccessibility from a remainder area to surrounding neighborhood centers. Such an injury is not considered an injury different in kind from that suffered by the neighboring owners, even if the owner of the remainder is affected to a greater degree.¹⁸² The primary limiting factor in the compensation for damages to remainders is setoff for the benefits accruing to the owner caused by the taking.¹⁸³

¹⁷⁵3 NICHOLS § 10.2211(3), at 388. See *Young v. State*, 252 Ind. 131, 246 N.E.2d 377, cert. denied, 396 U.S. 1038 (1969) (compensation should only be allowed when there is an actual taking of land). But see *State v. Geiger & Peters, Inc.*, 245 Ind. 143, 196 N.E.2d 740 (1964).

¹⁷⁶IND. CODE § 8-11-1-5 (Burns 1973).

¹⁷⁷*State v. Diamond Lanes, Inc.*, 251 Ind. 520, 242 N.E.2d 632 (1968).

¹⁷⁸*Tolliver v. State*, 246 Ind. 319, 205 N.E.2d 672 (1965).

¹⁷⁹4A NICHOLS § 14.21, at 14-49 to -52.

¹⁸⁰*Id.*

¹⁸¹*Sackman, supra* note 11, at 13, citing *Union R.R. Transfer & Stock Yard Co. v. Moore*, 80 Ind. 458 (1881).

¹⁸²*Sackman, supra* note 11, at 13-14.

¹⁸³See also the discussion of damages at notes 73-79 *supra* and accompanying text.

The second unusual area affecting abutters' rights is that of use of a highway for non-highway uses.¹⁸⁴ While non-highway use of a highway is not considered a violation of an easement or property right which is constitutionally protected from destruction without compensation, the injury differs so greatly from that to the rights of the public-at-large that the abutter is generally said to have experienced special and peculiar damages.¹⁸⁵

Although change of grade is normally not compensable, if there is interference with, or destruction of access, as a result of a change of grade from non-highway purposes, the abutter will be entitled to recovery.¹⁸⁶ The rule is the same even though the change of grade is legally authorized and consented to by the municipality.¹⁸⁷

IV. CONCLUSION

The study of the theory of inverse condemnation as it applies to adjacent property owners is important to the modern attorney. As public works continue to intrude into greater numbers of lives and property, there is an increased probability of uncompensated takings of land. The general practice attorney will be faced with the ever increasing likelihood that inverse condemnation cases will arise in his locality. Additionally, because of the greatly expanded scope of inverse condemnation cases, lawyers for public entities should be concerned about the unknown, unforeseeable, potential liability in connection with every public improvement.

CARL W. GROW

¹⁸⁴*City of Colorado Springs v. Stark*, 57 Colo. 384, 140 P. 794 (1914) (subway at streets crossing); *Aldis v. Union Elevated R.R.*, 203 Ill. 567, 68 N.E. 95 (1903) (elevated railroad); *Southwestern Tel. & Tel. Co. v. Smithdeal*, 59 Tex. Civ. App. 377, 126 S.W. 942 (1910) (telegraph line).

¹⁸⁵2A NICHOLS § 6.444, at 6-295.

¹⁸⁶*Id.* § 6.444(1), at 6-98. See *Sackman*, *supra* note 11, at 11-13, citing *Butler v. City of Kokomo*, 62 Ind. App. 519, 113 N.E. 391 (1916).

¹⁸⁷*Sackman*, *supra* note 11, at 12-13.