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Severance Damage in Eminent Domain Proceedings

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SEVERANCE DAMAGE IN EMINENT DOMAIN PROCEEDINGS

"[N]or shall private property be taken without just compensation."[1] Thus the Florida Constitution, and in similar terms the constitutions of forty-six other states[2] and of the United States,[3] limits government in its interference with the quiet enjoyment of private property.[4] It is not to be inferred, however, that every deprivation of private property by a sovereign is compensable; the nebulous area of a state's police power is generally immune from such a constitutional requirement.[5] If the police power exception is inapplicable, exercise of the sovereign's power of eminent domain[6] calls for strict enforcement of the constitutional requirement of compensation for the taking of private property.[7]

The extent of the remedy afforded under these constitutional provisions varies with the phraseology employed by the framers as well as with the construction adopted by the courts. Nevertheless, certain principles are inherent in all of these provisions: a taking of a tract of land entitles the owner to compensation for the value of the property actually taken; when only a part of a tract of land is taken the owner is entitled not only to recovery for the value of the part taken but also to compensation for injury to the remaining area.[8] This latter type of injury, peculiar to the partial taking situation, is aptly termed "severance damage."[9]

SEVERANCE DAMAGE DISTINGUISHED FROM CONSEQUENTIAL DAMAGE

It is important to differentiate between severance damage and consequential damage, in view of the effect of the distinction upon com-

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[1]FLA. CONST. Decl. of Rights §12.

[2]All states except North Carolina.

[3]U.S. CONST. amend. V.

[4]Shavers v. Duval County, 73 So.2d 684, 690 (Fla. 1954) (dictum).

[5]1 NICHOLS, EMINENT DOMAIN §1.42 (3d ed. 1950).

[6]Eminent domain is the power of the sovereign to take property for public use without the owner's consent. 1 NICHOLS, EMINENT DOMAIN §1.11 (3d ed. 1950).

[7]See Scott v. Toledo, 36 Fed. 385 (C.C.N.D. Ohio 1888); Moody v. Jacksonville, T. & K.W.R.R., 20 Fla. 597 (1884). The term "property" is broad enough to encompass both realty and personalty, but the eminent domain cases deal almost exclusively with appropriation of realty.

[8]*E.g.*, Worth v. West Palm Beach, 101 Fla. 868, 132 So. 689 (1931); St. Louis v. Paramount Shoe Mfg. Co., 237 Mo. App. 200, 168 S.W.2d 149 (1943); New Dells Lumber Co. v. Chicago, St. P., M. & O. Ry., 222 Wis. 264, 268 N.W. 243 (1936).

[9]United States v. Miller, 317 U.S. 369, 376 (1942) (dictum).

pensability. Although all damage may be termed "consequential" in that it follows from some act of the defendant, a more restricted use of the term is made in an eminent domain context. The Florida Court has employed the term "consequential damage" to refer to injury resulting to land no part of which has been physically appropriated;[10] it will be so used in this note.

In some jurisdictions, to label resulting injury as "consequential damage" is to deny compensation for the injury. In others, consequential damage may be as compensable as direct damage. The difference hinges on the particular phrasing of the constitutional provisions governing the exercise of the power of eminent domain. Thus, when a constitution is phrased to provide for compensation only in case of a taking,[11] consequential damage is not compensable.[12] When a constitution requires that the owner be compensated for taking or damage,[13] recovery may be had for consequential damage.[14] It is axiomatic, however, that the inclusion of the word "damage" in a constitution does not guarantee recovery for *every* type of consequential damage.[15] Nor does the omission of an affirmative constitutional recognition of the compensability of this type of damage preclude recovery under a statute specifically authorizing such an award.[16] The question of consequential damage was early settled in Florida; the Supreme Court has held that there must be an actual physical invasion for an injury to be compensable under the Florida Constitution.[17]

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[10]Selden v. Jacksonville, 28 Fla. 558, 575, 10 So. 457, 459 (1891) (dictum).

[11]*E.g.*, FLA. CONST. Decl. of Rights §12; IOWA CONST. art. I, §18; WIS. CONST. art. I, §13.

[12]*E.g.*, Selden v. Jacksonville, 28 Fla. 558, 10 So. 457 (1891); Pillings v. Pottawattamie County, 188 Iowa 567, 176 N.W. 314 (1920); Randall v. Milwaukee, 212 Wis. 374, 249 N.W. 73 (1933). *But see* Liddick v. Council Bluffs, 232 Iowa 197, 5 N.W.2d 361 (1942).

[13]*E.g.*, CAL. CONST. art. I, §14; GA. CONST. art. I, §3; MO. CONST. art. I, §26.

[14]*E.g.*, McCandless v. Los Angeles, 214 Cal. 67, 4 P.2d 139 (1931); Macon v. Daley, 2 Ga. App. 355, 58 S.E. 540 (1907); Guaranty Sav. & Loan Ass'n v. Springfield, 346 Mo. 79, 139 S.W.2d 955 (1940).

[15]See Miramar Co. v. Santa Barbara, 23 Cal.2d 170, 143 P.2d 1 (1943); Archer v. Los Angeles, 19 Cal.2d 19, 119 P.2d 1 (1941).

[16]*In re* Soldiers' and Sailors' Memorial Bridge, 308 Pa. 487, 162 Atl. 309 (1932); see Pillings v. Pottawattamie County, 188 Iowa 567, 570, 176 N.W. 314, 317 (1920) (dictum).

[17]Lewis v. State Road Dep't, 95 So.2d 248 (Fla. 1957); Weir v. Palm Beach County, 85 So.2d 865 (Fla. 1956); Bowden v. Jacksonville, 52 Fla. 216, 42 So. 394 (1906); Selden v. Jacksonville, 28 Fla. 558, 10 So. 457 (1891).

Nevertheless, severance damage — injury resulting to a remaining portion of a single tract based on the taking of another portion — is compensable not only in jurisdictions in which the constitutional provision covers taking and damage but also, as in Florida, where the provision is for taking alone.[18] The theoretical basis for allowing compensation for injury to land remaining to the owner is that the damage to the remainder area results directly and immediately from the taking of what was originally an integral part of the land.[19] "It is only because of the taking of a part of his land that [the owner] became entitled to any damages resulting to the rest."[20]

Requisites of Severance Damage

Two essential factors must be present to permit an award for severance damage. There must be a taking, and there must be a sufficient relationship between the part taken and the remainder area to warrant the conclusion that compensation for injury to the latter would be in effect compensation for the taking.

Taking

The multitude of factual distinctions and theoretical refinements relied on by the courts in determining when a taking has occurred are not within the scope of this note. Of necessity, various types of taking will be indirectly dealt with in considering the second of the essential elements. It should be recognized that there may be a taking without formally divesting the owner of his title to the property or of any possessory interest therein,[21] and that a taking may be accomplished by a trespass[22] as well as through the medium of statutory eminent domain proceedings.[23] The positions of the courts as to what facts constitute a taking may vary from the view of some juris-

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[18]See note 8 *supra*. Although the severance damage doctrine has long been a part of Florida case law, the 1957 Legislature gave its blessing to the doctrine by the enactment of Fla. Laws 1957, c. 57-165.

[19]See Stetson v. Chicago & E.R.R., 75 Ill. 74, 76 (1874) (dictum).

[20]Campbell v. United States, 266 U.S. 368, 371 (1924).

[21]United States v. Cress, 243 U.S. 316 (1917). See also State Road Dep't v. Tharp, 146 Fla. 745, 1 So.2d 868 (1941).

[22]See State Road Dep't v. Tharp, *supra* note 21; Seaboard Airline Ry. v. Southern Inv. Co., 53 Fla. 832, 44 So. 351 (1907).

[23]See Fla. Stat. c. 73 (1955).

dictions that any limitation on the free use and enjoyment of property is sufficient[24] to the view, as expressed by the Florida Court, that there must be a trespass to or physical invasion of the property.[25] Even within a single jurisdiction similar acts of appropriation may evoke dissimilar conclusions.[26]

Single Unit

Difficult questions arise in the process of determining whether the relationship between the part taken and the remainder area is sufficient to establish a right to recover for severance damage. Employment of the term "part" is suggestive of the problem: severance damage is compensable only when the portion taken and the damaged remainder constituted a single unit at the time of the taking.[27]

SINGLE UNIT: CONCEPTUAL ANALYSIS

In resolving the problem of what is a single unit, the courts have several recognized concepts available for manipulation. Two of these, physical contiguity and unity of use, are theoretically involved in every instance of partial taking, while a third concept, unity of title, is of more limited significance. As usual, the cases indicate that the weight assigned the concepts depends in large part on the result the court desires.

Physical Contiguity

Physical contiguity is sometimes treated by the courts as an important factor in determining whether several parcels will be considered as a unity or as separate tracts.[28] Yet it has been held that a

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[24]*E.g.*, Matter of The Grade Crossing Comm'rs, 6 App. Div. 327, 40 N.Y. Supp. 520 (3d Dep't 1896); Morrison v. Clackamas County, 141 Ore. 564, 18 P.2d 814 (1933); Myer v. Adam, 63 App. Div. 540, 544, 71 N.Y. Supp. 707, 709 (4th Dep't 1901) (dictum).

[25]Selden v. Jacksonville, 28 Fla. 558, 10 So. 457 (1891); *cf.* Board of Pub. Instr'n v. Bay Harbor Islands, 81 So.2d 637 (Fla. 1955).

[26]*Compare* State Road Dep't v. Tharp, 146 Fla. 745, 1 So.2d 868 (1941), *with* Arundel Corp. v. Griffin, 89 Fla. 128, 103 So. 422 (1925).

[27]See Sharp v. United States, 191 U.S. 341 (1903).

[28]*E.g.*, Oakland v. Pacific Coast Lumber and Mill Co., 171 Cal. 392, 153 Pac. 705 (1915); Kansas City, M. & O. Ry. v. Littler, 70 Kan. 556, 79 Pac. 114 (1905); St. Louis, M. & S.R.R. v. Aubuchon, 199 Mo. 352, 97 S.W. 867 (1906).

canal,[29] a railroad,[30] or a street[31] running through a tract of land does not per se create two separate parcels of land. Nor is a tract, otherwise single, regarded as divided merely because it is bisected by a lot line[32] resulting from platting the property. Thus actual physical contiguity in the strict sense is not necessarily a condition precedent to recovery for severance damage.

Unity of Use

To be considered a single tract the several parcels must, as a general rule, be put to a common use.[33] It is the actual joint use of the several parcels and not the possibility of such use that determines their unity.[34]

Conceptually, both physical contiguity and unity of use should be present in order for a tract of land to constitute a single unit. In practical application, however, the absence of one or the other is not necessarily fatal. Consider the following possibilities.[35]

Unity of Use Without Physical Contiguity. A nominal separation caused, for example, by an intervening street, railroad, or watercourse will not preclude an award for severance damage if the parcels on either side are used together for a single enterprise,[36] such as farming. In determining whether they are used together, mutual access between them may be a relevant factor.[37] How far a court will go in overlooking a physical separation cannot be precisely stated. One court[38] has held that condemnation of an interest in a wharf and lumberyard did not entitle the owner to compensation for the resulting injury to his planing mill and plant four hundred feet away,

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[29]Cameron v. Pittsburg & L.E.R.R., 157 Pa. 617, 27 Atl. 668 (1893).

[30]Missouri, K. & N.R.R. v. Schmuck, 79 Kan. 545, 100 Pac. 282 (1909).

[31]St. Louis, M. & S.R.R. v. Drummond Realty & Inv. Co., 205 Mo. 167, 103 S.W. 977 (1907).

[32]Alabama C.R.R. v. Musgrove, 169 Ala. 424, 53 So. 1009 (1910).

[33]*E.g.*, Baetjer v. United States, 143 F.2d 391 (1st Cir. 1944); United States *ex rel.* T. V. A. v. Indian Creek Marble Co., 40 F. Supp. 811 (E.D. Tenn. 1941); Kossler v. Pittsburg, C.C. & St. L. Ry., 208 Pa. 50, 57 Atl. 66 (1904).

[34]Kossler v. Pittsburg C.C. & St. L. Ry., *supra* note 33.

[35]Unity of title is discussed *infra*.

[36]See notes 29-31 *supra*.

[37]*E.g.*, Kansas City, M. & O. Ry. v. Littler, 70 Kan. 556, 79 Pac. 114 (1905); Cameron v. Chicago, M. & St. P. Ry., 42 Minn. 75, 43 N.W. 785 (1889).

[38]Oakland v. Pacific Coast Lumber and Mill Co., 171 Cal. 392, 153 Pac. 705 (1915).

separated by property of others but connected by a public street. Yet in *Baetjer v. United States*[39] separation of an owner's processing plant from his sugar fields by Vieques Passage, a two-mile-wide body of water between Puerto Rico and the island of Vieques, did not preclude consideration of the two as a unit. It was held that the owner was entitled to compensation for the severance damage occasioned to his processing plant by the condemnation of his sugar fields if the two formed a single productive unit.

Physical Contiguity Without Unity of Use. When actual physical contiguity exists, the mere absence of affirmative use of one part of a tract will not make that part distinct from those sections in use.[40] But if one portion of a tract is used for one purpose and another portion for an entirely distinct and separate purpose, the resulting disunity of use will probably preclude an award for severance damage.[41]

Unity of Title

When there is a difference in legal ownership between the part taken and the part remaining, courts may use a third concept, unity of title, to limit liability for severance damage. Obviously the land taken must be owned by the party claiming severance damage. But is it mandatory that the owner hold the entire tract by the same estate or interest? Compensation for severance damage was not allowed when an owner was seised in fee of the part taken and was a joint remainderman of the part not taken.[42] Similarly, when a husband owned one of the parcels in fee and held the other jointly with his wife, recovery for severance damage was denied.[43] In *Chicago & E.R.R. v. Dresel,*[44] however, the remainder area was held in fee and the part taken was an estate for a term of years, both held by the condemnee; the owner was compensated for severance damage to his freehold interest. And even though the condemnee possessed only an equitable title to one of several contiguous parcels, it was held that sufficient unity of title existed to permit compensation for severance

[39]143 F.2d 391 (1st Cir. 1944).

[40]See David Bradley Mfg. Co. v. Chicago and So. Traction Co., 229 Ill. 170, 82 N.E. 210 (1907).

[41]Stockton v. Marengo, 137 Cal. App. 760, 31 P.2d 467 (1934) (farm and service station).

[42]Conness v. Indiana, I. & I.R.R., 193 Ill. 464, 62 N.E. 221 (1901).

[43]Glendenning v. Stahley, 173 Ind. 674, 91 N.E. 234 (1910).

[44]110 Ill. 89 (1884).

damage.[45] The cases suggest that variation in estate or interest may thwart recovery for severance damage even though the requisite physical contiguity and unity of use are present.

CONCLUSION

Two conflicting social policies underlie the mass of verbiage that comprises the doctrine of severance damage: the traditional sanctity of private property and the desire to prevent undue restrictions on the state in its activities for the public benefit. The latter policy found expression in the requirement that there be a "taking" before compensation was due. Thus a bulwark was erected against claims for the unavoidable multitude of indirect injuries that flow from the exercise of eminent domain. To relieve the harshness of denying recompense for all indirect injury, the courts employed the fiction that damage to a remainder area resulted from the "taking" and was therefore compensable. This judicial recognition of the policy of protecting private interests has been accompanied in many jurisdictions by political activity culminating in constitutional provisions and legislative enactments extending the condemnor's liability to other areas of indirect injury.

Florida, although recognizing the landowner's right to recover for injuries within the narrow confines of the severance damage doctrine, has not extended his right to recovery by either constitutional or legislative provisions. Before allowing recovery for indirect injury through employment of the severance damage doctrine, the Florida Court requires an actual physical invasion. Once this invasion is established, however, the Court has shown little inclination to use the physical contiguity, unity of use, and unity of title concepts to limit the availability of the doctrine.[46]

There is no doctrine for recovery available to a landowner who suffers material injury but whose fact pattern does not fall within the Florida definition of a taking. The possibility of recovery in such a situation depends on the Florida Court's willingness to expand its conception of acts constituting a taking. In the absence of this, an extension of liability must result from legislative enactment or constitutional amendment.

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[45]Stockton v. Ellingwood, 96 Cal. App. 708, 275 Pac. 228 (1929).

[46]No cases were found in which the Florida Court discussed these concepts.