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The Landowner's Right of Access to the Abutting Street — A Damaging for the Public Use

I. BACKGROUND

Prior to the start of the twentieth century, the wording of most state constitutions provided for the recovery of compensation for an injury to one's property by a governmental instrumentality only where the injury constituted a "taking."¹ Unless there was an actual physical taking of the property, a landowner was not entitled to compensation for a damaging to his property by public works, as this was considered to be *damnum absque injuria*.² To alleviate the injustice created by this proposition, the majority of the states amended their constitutions to provide for the payment of compensation for a *damaging* as well as a *taking* of private property.³ In 1876 article I, section 17 of the Texas Constitution was amended to read as follows: "No person's property shall be taken, damaged, or destroyed for or applied to public use, without adequate compensation being made, unless by consent of such person. . . ."⁴ Today, the law is well settled that a direct physical invasion of property is not necessary to entitle an owner to compensation.⁵ Under the modern and prevailing view, any substantial interference with the rights accompanying the ownership of private property can result in a "taking" or "damaging" in the constitutional sense.⁶ It can be said as a general rule that a complete destruction of the use and value of property constitutes a taking.⁷ To establish "damages" as contemplated by article I, section 17, the courts have held that the landowner must show that his property incurred special damages not

¹ The applicable constitutional provision in Texas before 1876 read as follows: "No person's property shall be taken or applied to public use without just compensation being made, unless by consent of such person." TEX. CONST. art. I, § 14 (1869). See generally 2 NICHOLS, EMINENT DOMAIN 365-76, 390-98, 486-87 (3d ed. 1964).

² State v. Hale, 136 Tex. 29, 146 S.W.2d 731 (1941).

³ Stubbs, *Access Rights of an Abutting Landowner*, 1963 PROCEEDINGS OF S.W. LEGAL FOUNDATION INSTITUTE ON EMINENT DOMAIN 59, 61.

⁴ TEX. CONST. art. I, § 17. Compare the former provision, cited *supra* note 1.

⁵ McGammon & Lang Lumber Co. v. Trinity & B.V. Ry., 104 Tex. 8, 133 S.W. 247 (1911); Gainesville, H. & W. R.R. v. Hall, 78 Tex. 169, 14 S.W. 259 (1890). "To entitle the party to compensation under our present constitution, it is not necessary that the property shall be destroyed, nor is it necessary that it shall be even taken. It is sufficient to entitle him to compensation that his property has been *damaged*. The fact of being *damaged* entitles him to the protection extended by this constitutional provision, as fully as if his property had been actually taken or destroyed." Gulf, C. & S. F. R.R. v. Eddins, 60 Tex. 656, 663 (1884). For a thorough discussion of these cases and others, see RAYBURN, TEXAS LAW OF CONDEMNATION, 593-614 (1960).

⁶ See 2 NICHOLS, *op. cit. supra* note 1, at 407-09.

⁷ Fort Worth Improvement Dist. No. 1 v. City of Fort Worth, 106 Tex. 148, 158 S.W. 164, 168 (1913).

suffered by the community at large; *i.e.*, the damages must be different in kind, not merely in degree, from that suffered by the general public.⁸

In applying these damage principles, a distinction has sometimes been drawn between an exercise of the police power and an exercise of the power of eminent domain. The latter is defined as the power of the sovereign to take property for the public use without the owner's consent.⁹ The police power involves the regulation of property rights where their free exercise is considered detrimental to the public interest.¹⁰ Generally, the most important distinction between these two powers is that a damaging of property resulting from an exercise of the power of eminent domain requires a payment of adequate compensation; while a valid exercise of the police power which results in a damaging requires no compensation.¹¹ In the case of *Lombardo v. City of Dallas*,¹² involving a zoning regulation, the Supreme Court of Texas stated the rule that "police regulations do not constitute a taking of property under the right of eminent domain; and compensation is not required to be made for such loss as is occasioned by the proper exercise of the police power."¹³ An injury to private property caused by a police regulation is *damnum absque injuria*; it is compensated for by the sharing in the general benefits which the regulation is intended to secure.¹⁴ Of course, the police power cannot be exercised arbitrarily but (1) the purpose must be justified through public necessity,¹⁵ and (2) the means used must be reasonably necessary for the accomplishment of the purpose.¹⁶ However, it should be noted that some so-called exercises of the police power have been held to require the payment of compensation. The court in *Brazos River Authority v. City of Graham*¹⁷ stated:

But when the private property is 'taken, damaged or destroyed to a public use,' not because it has been used to the public detriment, but because the new use will be beneficial to the public, compensation must be made. We have seen no authority which holds that when power is exerted to consummate an enterprise in the public interest which requires the taking or damaging of private property, there may be no

⁸ *Id.* at 169. See generally 1 NICHOLS, *op. cit. supra* note 1, at 87.

⁹ See 1 NICHOLS, *op. cit. supra* note 1, at 87.

¹⁰ Kucera, *Eminent Domain v. Police Power—A Common Misconception*, 1959 PROCEEDINGS OF S. W. LEGAL FOUNDATION INSTITUTE ON EMINENT DOMAIN 1.

¹¹ *Id.* at 7.

¹² 124 Tex. 1, 73 S.W.2d 475 (1934).

¹³ *Id.* at 478.

¹⁴ *Barbier v. Connelly*, 113 U.S. 27 (1884); *Ellis v. City of West Univ. Place*, 141 Tex. 608, 175 S.W.2d 396 (1943).

¹⁵ *Spann v. City of Dallas*, 111 Tex. 350, 235 S.W. 513, 515 (1921).

¹⁶ *Lawton v. Steele*, 152 U.S. 133 (1894).

¹⁷ 335 S.W.2d 247 (Tex. Civ. App. 1960), *aff'd*, 354 S.W.2d 99 (1962).

compensation. *Whether the power so exercised is called the police power or the power of eminent domain, it nevertheless results in a taking or damaging in the purview of the constitutional provision.*¹⁸

Thus, even if a governmental instrumentality claims that it has exercised its police power for the protection of society, the courts will not categorically deny the payment of damages when it is clear that the property was damaged for the public use. The results in *Brazos River* do not seem unusual in view of the fact that the damaging was caused by the construction of a dam for the public use—an obvious exercise of the power of eminent domain.

II. THE ABUTTING LANDOWNER'S RIGHT OF ACCESS

An abutting landowner has an easement of access to the street or highway immediately appurtenant to his property, and this easement is not shared with the public at large but arises out of and is peculiar to the ownership of the fee.¹⁹ Although the origin of this proposition is uncertain, it appears to be a product of the rapid urban development in America and stems from the leading case of *Story v. New York Elevated R.R.*,²⁰ decided in 1882. The doctrine of abutter's rights has been extended until today it is generally accepted that not only the easement of access, but also the easements of light, air, and view from the street attach to the ownership of adjoining lands.²¹ The "right of access" as used in this context means that a property owner possesses an easement of access to the abutting street at any or all points included within his frontage on the street.²² This right, which is recognized as being "property" in the constitutional sense, is subordinate to the paramount interest of the public in the use of the highway.²³ However, the overwhelming majority of jurisdictions, including Texas, hold that the right of access cannot be taken or destroyed for the public use without the payment of adequate compensation.²⁴ The courts are equally agreed upon the prop-

¹⁸ 335 S.W.2d at 251. (Emphasis added.)

¹⁹ *Talltimbers Corp. v. Anderson*, 370 S.W.2d 214, 233 (Tex. Civ. App. 1963), *aff'd*, 378 S.W.2d 16 (1964); *Kalteyer v. Sullivan*, 46 S.W. 288, 290 (Tex. Civ. App. 1898) *error ref.*

²⁰ 90 N.Y. 112 (1882). For a complete analysis and history of the doctrine of abutter's rights, see NETHERTON, *CONTROL OF HIGHWAY ACCESS* 35 (1963).

²¹ *American Constr. Co. v. Seelig*, 104 Tex. 16, 133 S.W. 429 (1911). See also 3 NICHOLS, *op. cit. supra* note 1, at 369.

²² *In re Appropriation of Easement for Highway Purposes*, 93 Ohio 179, 112 N.E.2d 411, 415 (1952).

²³ *Gulf, C. & S. F. Ry. v. Fuller*, 63 Tex. 467, 469 (1885).

²⁴ *Adams v. Grapotte*, 69 S.W.2d 460, 462 (Tex. Civ. App. 1934), *aff'd*, 130 Tex. 587, 111 S.W.2d 690 (1938); *City of Texarkana v. Lawson*, 168 S.W. 867 (Tex. Civ. App. 1914) *error disp.* For the law of other jurisdictions, see 2 NICHOLS, *op. cit. supra* note 1, at 364-83, 486-98.

osition that the right of access is subject to police regulation for the health, safety, and general welfare of the public; and the authorities agree that the property owner is not entitled to compensation for an interference with this right by a reasonable exercise of the police power.²⁵ However, the courts have held that a legitimate exercise of the police power cannot interfere with one's right of access to the extent that it constitutes a complete taking, as distinguished from a damaging.²⁶ A complete taking based on an exercise of the police power will require the payment of compensation. This rule was applied somewhat by the Texas Supreme Court in the recent case of *San Antonio v. Pigeonhole Parking*.²⁷ The court held that where an owner's land abuts on two streets, the city under its police power can deny all access to one of the streets by an ordinance which is intended to alleviate the traffic hazard created when a driveway is constructed across a public sidewalk. The decision rests on the rationale that there is no taking of an owner's right of access under the police power when he is left with reasonable access to his property by way of another street and that any resulting loss or inconvenience is *damnum absque injuria*. Thus, one's right of access to a particular street can be completely taken by an exercise of the police power without the payment of compensation so long as some means of reasonable access to the property is left.

The greatest difficulty arises when the right of access is damaged through an exercise of the power of eminent domain. The Texas Supreme Court in *Powell v. Houston & T.C. Ry.*²⁸ stated that any impairment or depreciation in the value of one's right of access constitutes damages within the meaning of article I, section 17 of the Texas Constitution. To be compensable, the injury must be shown to be special in kind and not one shared in common with the public as a whole.²⁹ It should be noted, however, that with the advent of modern freeways and controlled access highways, several doctrines have evolved which limit and restrict the recovery of damages for an injury to one's right of access.³⁰ The first doctrine involves the "diversion of traffic" by the construction of a new highway or street which usually parallels the old roadway. As stated by the court in

²⁵ See note 15 *supra* and accompanying text. For a general discussion of this topic, see Comment, *Eminent Domain v. Police Power as Related to the Abutting Owner's Right of Access*, 14 BAYLOR L. REV. 70 (1962).

²⁶ *Gulf Ref. Co. v. Ft. Worth*, 36 S.W.2d 285 (Tex. Civ. App. 1931); *Gulf Ref. Co. v. Dallas*, 10 S.W.2d 151 (Tex. Civ. App. 1928) *error dismissed*.

²⁷ 158 Tex. 318, 311 S.W.2d 218 (1958); see Note, 12 Sw. L.J. 522 (1958).

²⁸ 104 Tex. 219, 135 S.W. 1153 (1911).

²⁹ See note 9 *supra*.

³⁰ See Gibbs, *Control of Highway Access—Its Prospects and Problems*, 12 S.C.L.Q. 377 (1960).

Pennysavers Oil Co. v. State,³¹ "no abutting property owner has a vested interest in the traffic that passes in front of his property, and if this traffic is diverted by the State building a road at another place, and the traveling public prefer to travel the new road and abandon the old road, the State cannot be held liable for any loss of trade suffered by an abutting landowner in the old abandoned road." In other words, there is no liability if, by the construction of the new roadway, the state does not impair or destroy the abutting landowner's access rights to the old roadway. The "circuitry of travel" doctrine involves changes in the design or structure of the highways whereby the abutter retains his access to the public highway but is compelled to use a more circuitous route to go to and from his property. This situation often arises when the changes in the highway involve the making of one-way streets, prohibition of U-turns, divided highways, and control of entrance and exits to such highways.³² The majority of jurisdictions view "circuitry of travel" as noncompensable damage on the basis that it is not special in nature but is shared in varying degree by the public in general.³³ As long as the abutter is left with reasonable access, his special interest in access to the highway is satisfied. An opposing view, often criticized,³⁴ holds that the abutter's interest does not involve merely the opportunity to go onto the street in front of his property but rather involves the right of direct access from his property to the abutting street.³⁵ The third doctrine involves the situation where a street which once intersected with a highway is blocked so that it terminates at the freeway. The resulting dead-end street is known as a "cul-de-sac," and the doctrine is accorded the same name. The courts have split on the question of whether the owner of property abutting on a street turned into a cul-de-sac is entitled to compensation. In the California case of *Bacich v. Board of Control*,³⁶ the abutter was allowed to recover damages on the basis that the right of access extends in both directions to the next intersecting street. This view appears to conflict with the circuitry of travel doctrine which implies that where the abutter on a cul-de-sac still has reasonable access to the general system of streets from the other direction, any damage resulting

³¹ 334 S.W.2d 546, 549 (Tex. Civ. App. 1960) *error ref.*

³² See Gibbs, *supra* note 30, at 393.

³³ *Wilson v. Iowa State Highway Comm'n*, 249 Iowa 994, 90 N.W.2d 161 (1958); *Cavanaugh v. Gerk*, 313 Mo. 375, 280 S.W. 51 (1926); *Lindley v. Oklahoma Turnpike Authority*, 262 P.2d 159 (Okla. 1953).

³⁴ See Comment, *Freeways and the Rights of Abutting Owners*, 3 STAN. L. REV. 298, 307 (1951); Comment, *Eminent Domain—Damages—Recovery for Interference With the Right of Access*, 18 SO. CAL. L. REV. 42 (1944).

³⁵ *People v. Ricciardi*, 23 Cal. 2d 390, 144 P.2d 799 (1944).

³⁶ 23 Cal.2d 343, 144 P.2d 818 (1943).

from his inconvenience is noncompensable. Most jurisdictions have accepted the general rule³⁷ that an abutter on a dead-end street suffers no special damage as long as he is left with reasonable access to the general system of streets in one direction.

III. DUPUY v. CITY OF WACO³⁸

In 1962 the city of Waco elevated South Seventeenth Street by the construction of a viaduct to improve the flow of traffic. DuPuy's property had fronted on this street, but after construction of the viaduct it was left fourteen feet below South Seventeenth. A concrete pillar formed a solid barrier to the immediate right of his building so that the only means of access to DuPuy's property was by a way under the viaduct between the supporting columns and dead-ending at his property or via an alley running from the side of his building to Franklin Avenue. In other words, the property was left abutting on a cul-de-sac under the viaduct. DuPuy recovered damages in the trial court under article I, section 17 of the Texas Constitution for the impairment of his right of access. The court of civil appeals³⁹ reversed on the ground that the construction of the viaduct was a reasonable exercise of the police power and any damage to DuPuy was *damnum absque injuria*.⁴⁰ In reversing the court of civil appeals, the Texas Supreme Court held (1) that the city of Waco had constructed the viaduct for the public use rather than for the purpose of regulating the use of DuPuy's property in the public interest; and (2) that DuPuy had suffered compensable damages within the meaning of article I, section 17; the road ending in the cul-de-sac was held an unreasonable means of access.

The city of Waco and the attorneys for several other municipalities filing amicus curiae briefs contended that DuPuy was not entitled to recover for damages to his right of access because the construction of the viaduct was a reasonable exercise of the police power. The court rejected this argument on two grounds. First, the construction of the viaduct lacked the essential elements of an exercise of the police power in that (1) DuPuy's property was not being used to the *detriment* of the public interest; and (2) the property was not being subjected to any type of *regulation*.⁴¹ Secondly, the

³⁷ New York, C. & St. L. R.R. v. Bucsi, 128 Ohio St. 134, 190 N.E. 562 (1934); City of Lynchburg v. Peters, 145 Va. 1, 133 S.E. 674 (1926).

³⁸ 396 S.W.2d 103 (1965).

³⁹ City of Waco v. DuPuy, 386 S.W.2d 192 (Tex. Civ. App. 1964).

⁴⁰ See note 27 *supra* and accompanying text. The court followed the reasoning of *Pigeonhole Parking*, holding that the plaintiff had no cause of action since there was no actual physical taking and he was left with reasonable access.

⁴¹ 396 S.W.2d at 107.

court turned to the rationale of *Brazos River* in saying "our refusal to compartmentalize an exercise of sovereignty as either police power or eminent domain for the resolution of problems arising under article I, section 17, of the Constitution rests upon the manifest illusoriness of distinctions between them."⁴² Thus, regardless of what power the city claimed that it had exercised, the property owner was entitled to recover any special damages to his right of access since the viaduct was constructed for the *public use* and not necessarily for the health, safety, and general welfare of the public.

Therefore, the basic question before the supreme court was whether DuPuy's access rights had been impaired to such an extent as to fall within the meaning of "damages" as contemplated by article I, section 17 of the constitution. The court first pointed out that the right of access is a protected easement in Texas, but at the same time stated:

This [protection] should not be extended to recognize a compensable damaging where a property owner has *reasonable access* to his property after construction of the public improvement. The benefits of private ownership have been assured so long as there is *reasonable access* and an action for compensation under the Constitution will not lie where such is the case.⁴³

Applying this rationale to the instant case, the court held that DuPuy's right of access had been damaged as a matter of law under article I, section 17, *i.e.*, he had been deprived of reasonable ingress and egress to his property by the construction of the public improvement. Apparently, the court adopted the doctrine that a property owner whose land is left abutting on a cul-de-sac after the construction of a public improvement suffers special damages not common to the community at large.⁴⁴ Even though DuPuy still had reasonable access to his property in one direction by a way between the

⁴² *Ibid.*

⁴³ *Id.* at 109. (Emphasis added.) It should be noted that the court considered the question of damages as contemplated by article I, section 17 of the constitution to be one of law and not one of fact. The court relied primarily on the decision in *Housing Authority of City of Dallas v. Higginbotham*, 135 Tex. 158, 143 S.W.2d 79 (1940). In that case the Texas Supreme Court held that the question of what is a public use under article I, section 17 of the constitution is a question of law for determination by the courts. The California Supreme Court in the *Ricciardi* case, 23 Cal. 2d 390, 144 P.2d 799 (1944), adopted the same rule. On the other hand, the Supreme Court of Minnesota held this same question to be one of fact in *Henderson v. State*, 267 Minn. 436, 127 N.W.2d 165 (1964).

⁴⁴ The court gave approval to the case of *In re Hull*, 163 Minn. 439, 204 N.W. 534, 205 N.W. 613 (1925), which held that an owner who is left abutting on a cul-de-sac suffers special damages not common to the general public. It should be noted that the court made no mention of the alley running from DuPuy's property to Franklin Avenue in considering whether he had reasonable access to his property. Apparently, an alley is not considered a reasonable means of access.

supporting columns beneath the viaduct, the court stated that "it is not enough that DuPuy can get to the system of public roads and the traveling public can get to his building."⁴⁵ It appears that here the court considered the creation of a cul-de-sac in itself an unreasonable interference with the right of access.

In a companion case, *Archenhold Auto. Supply Co. v. City of Waco*,⁴⁶ the court held that the property owner was not deprived of reasonable access by the construction of the same viaduct on South Seventeenth. However, the case differed from *DuPuy* in that Archenhold's property fronted not only on South Seventeenth but also on Franklin Avenue, a major traffic artery in the city of Waco. Even though the majority of the court stated that Archenhold's access rights on South Seventeenth had incurred "special damages not suffered in common with general public,"⁴⁷ it held that under the circumstances these damages were not compensable within the meaning of the constitutional provision. The Texas Supreme Court applied the New York rule⁴⁸ that "one of two public streets may be closed without compensation to an abutting landowner if the remaining street furnishes suitable means of access."⁴⁹ The majority expressed the opinion that "the question of whether Archenhold retained reasonable access should not be fragmented, *i.e.*, be made to turn on what happened on South Seventeenth Street apart from the unimpeded frontage on Franklin Avenue."⁵⁰ In short, Archenhold was denied recovery for damages to its access rights on South Seventeenth because it still had reasonable access to its property via Franklin Avenue. Three justices dissented on the ground that Archenhold's right of access on South Seventeenth had suffered special damages for the public benefit, as acknowledged by the majority; and therefore, according to article I, section 17, he was entitled to compensation.⁵¹ The dissent seems to be the more sound and logical opinion if one accepts the idea that the landowner has a right of reasonable access to each separate street abutting his property. Conversely, the soundness of the majority opinion depends on the acceptance of the rationale that one's right of access must be considered in totality rather than segmented in individual abutting streets. The latter view

⁴⁵ 396 S.W.2d at 110.

⁴⁶ 396 S.W.2d 111 (1965).

⁴⁷ *Id.* at 114.

⁴⁸ *Egerer v. New York Cent. & H. R. R.R.*, 130 N.Y. 108, 29 N.E. 95 (1891); *Fearing v. Irwin*, 55 N.Y. 486 (1874). The rule as applied here in an eminent domain case is actually the same as that announced in *Pigeonhole Parking*. See note 27 *supra* and accompanying text.

⁴⁹ 396 S.W.2d at 114.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

will obviously reduce the liability of governmental agencies in many instances similar to that of *Archenhold*.

IV. CONCLUSION

If a Texas municipality interferes with one's right of access by a reasonable exercise of the police power for the purpose of regulating property being used to the public detriment, any resulting damage will be held to be *damnum absque injuria* so long as the access rights are not completely taken. On the other hand, the decisions of *Brazos River* and *DuPuy* have made it equally clear that an abutting landowner can recover damages for an impairment of his access rights for the public use regardless of the fact that the governmental agency claims to be exercising its police power. Whether the basis upon which a public improvement is constructed is under the power of eminent domain or the police power will be an important factor in determining whether a landowner has suffered a compensable damaging.

Apparently, the court in *DuPuy* has established the general rule that one's right of access is not damaged within the purview of article I, section 17 of the Texas Constitution so long as he is left with reasonable access to his property. Unlike the rule in the *Bacich* case,⁵² it does not appear that *DuPuy* stands for the proposition that an abutter who is left fronting on a cul-de-sac is automatically entitled to compensation. A landowner in such a situation could still have reasonable access to his property via some other street. However, it does appear safe to say that when a landowner is left abutting only on a cul-de-sac and has no reasonable means of access, he can invoke article I, section 17. Under the rule of *DuPuy*, as illustrated by *Archenhold*, even though a landowner's access rights may suffer special damages not common to the general public, he may not recover if he still has reasonable access to his property.⁵³ The validity of this rule is based on the court's refusal to fragment the property owner's right of access in separate streets. Under this rationale, an owner whose property abutts on four streets could suffer special damages to his right of access via three streets and yet not be entitled to compensation because he still has reasonable access by way of the fourth street. In effect, it appears that the court has carried over to the public use cases the principle of *Pigeonhole Parking*,⁵⁴ i.e., that

⁵² See note 36 *supra* and accompanying text.

⁵³ See note 51 *supra* and accompanying text.

⁵⁴ See note 27 *supra* and accompanying text.