# COMPENSATION FOR NOISE DAMAGED PROPERTY

by

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## SUMMARY

The U. S. Constitution and the constitution of every state, except North Carolina, requires "just compensation" to be made for property taken by eminent domain. Courts both in Virginia and elsewhere have taken a very narrow view of this requirement where there is only indirect damage to property. Reformers, unhappy with the failure of government to pay for these damages, attempted to solve the problem by adding "damaging" provisions to their state constitutions. The reformers found, however, that their victory had again been whittled down by judicial interpretation. To be compensable today in most jurisdictions damage must be physical; it must affect the "corpus" of the property or "rights appurtenant thereto." Noise and similar environmental factors do not meet that qualification.

As of July 1973, the lone exception to this generalization in highway cases is the State of Washington. The Dahlin case, decided in that state in 1971, held that substantial damage caused by highway noise alone was sufficient to require compensation under the constitution of that state.

The Dahlin decision capped a series of cases which have extended the constitutional requirement for compensation in aircraft damage cases. Before the 1946 U. S. Supreme Court Causby decision, compensation was required only if the property was physically appropriated or its usefulness completely destroyed. Causby held that a landowner suffering "substantial" damage as a result of aircraft overflights directly over his property is entitled to be compensated under the Fifth Amendment of the U. S. Constitution.

A series of cases followed in which the question of "substantiality" was at issue. In 1962 a further step was taken by the Supreme Court of Oregon in interpreting the state's constitution; it found compensation to be required even though the offending aircraft did not fly directly over the property. A similar decision by the State of Washington Supreme Court followed in 1964. Then came the Dahlin case in 1971. While the State of Washington is the only jurisdiction so far to apply the principle to highway cases, it appears quite probable that more state and federal courts will do so in the future. The liberalization in the airplane cases has been widely debated and discussed in the legal profession, generally with approval. Since it is difficult to justify why the same damage which would be compensable if inflicted by an airplane would not be compensable if inflicted by a busy highway, it seems likely that the trend will be toward more liberal highway compensation requirements.

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## I. INTRODUCTION

There have been in recent years two important legal developments regarding noise damage which may significantly increase the cost of Virginia right-of-way acquisitions. First, several court opinions have taken an expanded view of constitutionally required "just compensation" in condemnation litigation. Second, the federal government has recently promulgated noise standards which must be met in the design of all future federal-aid highways. While these regulations will have an important effect on the Highway Department's operations, and a summary of the regulations is included, the main purpose of this report is to assess the case law regarding "just compensation" for noise damage.

Generally speaking, the state is not required to compensate a landowner for damage caused by a highway unless part of the landowner's property is physically taken. Thus, the value of a landowner's property may be seriously reduced because of the noise, dust and vibrations from a new highway, yet the state is not legally obliged to pay for this damage. The law has traditionally treated such damages as "merely" incidental and not compensable, regardless how close the highway is to the landowner's property, or how substantial the reduction of value. Recent judicial opinions indicate that the law on this point is changing; the courts are increasingly willing to require the states to pay the landowner for direct and serious damages sustained in this situation.

The analytical problem is a familiar one: Where should the line be drawn? Everyone agrees that if the state actually takes part of an owner's property, the landowner should be paid the value of the part taken and damages to the remainder. Similarly, everyone agrees that a landowner should not be compensated just because the state builds a prison several blocks down the street, even though the prison may have a generally depressing effect on property values in the neighborhood. Between the extremes, however, there is a troublesome gray area. Should the government pay the landowner when it creates a dump adjacent to his property and the owner can show a direct substantial effect on the value of his residence? What should be the compensation policy where the government builds an airport in such a way that the extremely loud noises of low flying jets make the landowner's property nearly uninhabitable? Many highway noise situations fall into this area of uncertain policy.

A new rule of compensability will have obvious significance to individual landowners. What may not yet be obvious is that a liberalized rule may have an important effect on government highway budgets. It is hoped that this report will contribute to a wider awareness in the Highway Department of these possible changes, so that adequate planning may be made for the transition to a new rule on compensation if such a transition in fact occurs.

## II. THE TRADITIONAL LAW OF COMPENSATION FOR INDIRECT DAMAGE TO PROPERTY

### A. Federal Court Interpretation of the Fifth Amendment Requirement of "Just Compensation."

#### 1. The Fifth Amendment

The Fifth Amendment of the United States Constitution, which is more famous for its right against self-incrimination, also includes the guarantee of just compensation in condemnation. In pertinent part, the guarantee is as follows:

> No person shall. . .be deprived of. . .property, without the due process of law. . .nor shall private property be taken for public use, without just compensation.

As a part of the Bill of Rights (the first ten amendments) this guarantee applies only to the federal government in federal condemnation; by its terms it does not apply to the states. Ostensibly, therefore, the Fifth Amendment does not apply to most highway condemnation, since most highway takings are made by the states (though they receive federal funds for federal projects).

As with most of the rights included in the Bill of Rights, however, the Fifth Amendment has been interpreted by the U. S. Supreme Court to apply to the states through the Fourteenth Amendment. The Fourteenth Amendment, one of the Civil War amendments, states that:

> No state shall. . .deprive any person of life, liberty, or property, without due process of law. . . .

The U. S. Supreme Court has held that a failure of a state to pay "just compensation" for land taken in condemnation is a violation of Fourteenth Amendment "due process."(1)

Thus, however indirectly, the guarantee of "just compensation" does apply to the states. But what is the guarantee? What is "property"? When is it "taken" or "damaged"? What is "just compensation" for such damage? The definition of these fundamental terms must be sought in judicial opinions.

2. The Flooding Cases: "Physical Encroachment" a Necessary Condition for Compensation to be Required

Many of the early "just compensation" interpretations were made in flooding cases. Both because of this historical background and because the flooding cases are useful in analyzing the various kinds of indirect damage to property, a brief review of them provides a good introduction to the problem.

The first important case was Pumpelly v. Green Bay Company, 80 U.S. 166 (1871), which simply involved the permanent flooding of a portion of the owner's land. The Supreme Court had no difficulty in recognizing this as a "taking" which required "just compensation."

The cases that followed presented more difficult situations. Gibson v. United States, 166 U.S. 269 (1897), involved the suit of a landowner against the government, which had constructed a dike across part of a river. This made the main channel in the river unnavigable, and thereby destroyed access of commercial vessels to the landowner's island. The business of the landowner, who produced fruits and vegetables on the island, was seriously impaired. The court in Gibson denied recovery, citing the fact that there was no "direct invasion of the land"(2) and emphasizing that the construction of the dike was an act "done in the proper exercise of governmental powers."(3)

In United States v. Cress, 243 U.S. 316 (1917), the Supreme Court came to a different conclusion because of what it thought to be a decisive difference — there was a physical invasion of the land. The U. S. Government had constructed a dam which resulted in periodic overflowing upstream. Two landowners sued; both cases, since they involved nearly identical facts, were heard together in U. S. v. Cress. The property of one owner was subjected to frequent flooding, and the value of this property was diminished by the destruction of a ford he had been using. In the second landowner's case, his mill was rendered useless by the dam because his waterwheel would not operate at the higher water level. The court awarded both owners recovery since there was a physical encroachment which was lacking in Gibson v. United States (supra). The court noted that the property was not permanently flooded as it was in Pumpelly v. Green Bay Company (supra), but this did not prevent recovery; ". . . (i)t is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines. . . whether it is a taking."(4) In other words, if there is an actual physical invasion — even if only a periodic one — there may be recovery, but if there is no physical invasion, there is no recovery, even if the damage is substantial.

The case of United States v. Willow River Power Co., 324 U.S. 499 (1915), involving facts strikingly similar to those in United States v. Cress, arrives at the opposite conclusion. A strong dissent by Justice Roberts argued that United States v. Cress should have controlled. The reasoning of the majority opinion is important because it appears frequently in the long debate over consequential damages.

The claimant in the Willow River case was a power company which operated a hydroelectric power plant on the St. Croix River, a tributary of the Mississippi. The government built a dam on the Mississippi which caused a backup on the St. Croix. The three-foot water level increase at the power plant diminished its power output, forcing the power company to purchase power elsewhere so as to be able to meet its commitments to users. The power company sued the government for these damages. In denying recovery the Willow River court states that "the Fifth Amendment. . .does not undertake to socialize all losses, but only those which result from a taking of property. If damages from any other cause are to be absorbed by the public, they must be assumed by an act of Congress and may not be awarded by the courts merely by implication from the constitutional provision."(5) Furthermore, there was not in this case a "taking" of a "property right,"(6) and "(t)he uncompensated damages sustained (here) are not different from those suffered without indemnification by owners abutting on public highways. . ."(7) Justice Roberts, in dissent, was unable to see how this case differed from United States v. Cress, and strongly argued that Cress should control Willow.

### 3. The "Physical Encroachment" Doctrine as Applied in the Two Leading Federal Cases

The first important non-flooding case on constitutional "taking" was Transportation Co. v. Chicago, 99 U.S. 635 (1879). This U. S. Supreme Court opinion addressed the indirect taking issue and reaffirmed the requirement of a "physical encroachment" which had developed in the flooding cases. The plaintiff in the case, a shipping firm, owned property (warehouses, office buildings and docks) abutting the Chicago River. LaSalle Street abutted the plaintiff's property on an adjacent side and crossed the river. The City of Chicago, in the process of replacing the LaSalle Street Bridge, did not physically infringe on the firm's property; it did, however, construct a coffer dam upstream to aid the construction of the bridge. As a result, the shipping firm was denied access to its docks for a year, and was forced to rent other facilities during that time in order to continue business. The plaintiff sued for damages on the theory of nuisance and the Fifth Amendment guarantee of compensation for the taking of private property.

The court allowed no recovery against the city. It declared that the Fifth Amendment guarantee for just compensation in eminent domain takings has been "universally" held not applicable unless "directly encroaching upon private property."[8] Furthermore, the court allowed no recovery on the nuisance (tort) theory. It pointed out that the requirements for a showing of a public nuisance are much more stringent than for a private nuisance. That is, many acts which would constitute a nuisance when done by one citizen to another would not be an actionable nuisance if done by the government for the common good. The court held that the plaintiff could not meet the public nuisance burden of proof in this case.

Furthermore, the court declared the doctrine of sovereign immunity to be applicable; the government is immune to suit unless it consents to be sued. The legislature may by statute grant compensation to injured individuals, ". . .but then the right is a creature of the statute. It has no existence without it."[9] The constitutional requirement is applicable only to those cases of "direct encroachment." In the court's view, the "extremest qualification"[10] of this doctrine had been in the case of Pumpelly v. Green Bay Company, (supra), in which a landowner was awarded compensation for the permanent flooding of his property by the government. The court in Transportation Co. noted carefully that in Pumpelly there was a "physical invasion of the real estate of the owner, and a practical ouster of his possession."[11] In contrast, said the court in Transportation Co., "all that was done (in the present case) was to render for a time its use more inconvenient."[12] In discussing the limited liability of the government on either a nuisance or an eminent domain theory, the court noted that "the doctrine, however it may at times appear to be at variance with natural justice, rests upon the soundest legal reason,"[13] because it is of primary importance that governmental functions be accomplished with a minimum of obstruction.

As noted by the Supreme Court in Transportation Co., the provision in the Illinois constitution guaranteeing compensation for "damaged" property had been so narrowly construed by the Illinois Supreme Court that it provided no basis for relief in this case.[14] (See the discussion of the state "damaging" clauses on page 10 below.)

In summary, Transportation Co. v. Chicago provides strong Supreme Court authority for the proposition that in those cases where no real estate is physically appropriated for the use of the government, there is no constitutional (Fifth Amendment) requirement for compensation of damages.

The U. S. Supreme Court again squarely addressed the question of indirect damages in the landmark case of Richards v. Washington Terminal Co., 233 U.S. 546 (1914), a federal case coming from District of Columbia courts. Richards affirmed and buttressed the view of the limited constitutional requirement; it is (with qualifications to be discussed later in this report) still the controlling federal decision. The plaintiff in Richards was the owner of an apartment house near, but not adjoining, the Washington Terminal Company's railroad. The railway emerged from a tunnel on a grade past the plaintiff's property. Thirty trains a day passed over the tracks. Some of these trains stopped on the grade; the process of starting the train up the grade was attended with much noise and smoke. The plaintiff's buildings were 114 feet from the entrance of the tunnel and there were three intervening dwellings between his property and the railroad. Nevertheless, it was agreed that the plaintiff was damaged by smoke, dust, dirt, cinders and gases. In particular, the tunnel was vented by fans which pulled the collected gases, dirt and smoke from the tunnel and propelled them directly onto the plaintiff's property. Train vibrations broke windows and created cracks in the walls. Noise made it difficult to sleep and destroyed the quiet atmosphere. Unable to rent his building, the owner was forced to move into it himself. The government conceded that the owner had sustained a financial loss of $2100, but contended that the loss was not compensable under the law.

The court held that most of the damage was damnum absque injuria ("damage without legally recognized injury"). Again the Supreme Court emphasized that "public agencies are to be largely free from suit. . .it has become established that railroads constructed and operated for public use. . .are not subject to actions in behalf of neighboring property owners for the ordinary damages attributable to. . .the railroad in the absence of negligence."(15) The court found that here "there is no exclusive and permanent appropriation of any portion of plaintiff's land which indeed does not even abut,"(16) and "since he is not wholly excluded from the use and enjoyment of his property, there has been no 'taking' of the land in the ordinary sense."(17) In another comment, the court states that ". . .property not directly invaded nor peculiarly affected" cannot be a "taking".(18) Another formulation of the court's policy was that "immunity is limited to such damages as naturally and unavoidably result from the proper conduct of the road and are shared generally by property owners whose lands lie within the range of the inconveniences necessarily incident to proximity to a railroad. It includes the noises and vibrations from the locomotives, and similar annoyances inseparable from the normal and non-negligent operation of a railroad."(19) The court explicitly recognized that "the immunity from liability for incidental injuries is attended with a considerable degree of hardship to the private landowner, and has not been adopted without some judicial protest."(20) The court felt that a contrary policy would have the practical result of bringing the construction and operation of railroads to a standstill.

Richards v. Washington Terminal Co., while providing the leading authority regarding the noncompensability of "consequential" damages, at the same time left a bench mark as to the limitation of the doctrine. The Richards court held that portion of the damage which was caused by the railroad's tunnel exhaust fans to be "special and peculiar"(21) damage, and that as such, it must be compensated for under the Fifth Amendment guarantee that private property shall not be taken without just compensation.

> We deem the true rule, under the Fifth Amendment. . . to be that while the legislature may legalize what otherwise would be a. . .nuisance, it may not confer immunity as to amount in effect to a taking of private property for a public use.(22)

How, exactly, did the Richards court decide that the damage from the exhaust fans was "special and peculiar" damage (and therefore a "taking" and compensable), while the damage from noise and vibration was merely "consequential" damage (and therefore not a "taking" and not compensable)? More importantly, what are the specific legal guidelines to be used in the future in determining which category a given situation falls into? There is no simple answer to these questions. The courts have leaned one way, then the other, depending on individual factual contexts. Decisions in this area are marked by vigorous dissents, and often appear to have been made on the basis of the practical effects on the specific parties involved rather than on doctrinal precepts.

## B. State Constitutional Provisions and Their Judicial Interpretation

### 1. "Just Compensation" Under State Constitutions

All of the states, with the exception of North Carolina, have included guarantees of "just compensation" in their constitutions. (North Carolina has achieved substantially the same result through other provisions in its constitution.) This means, of course, that a landowner who feels aggrieved in a state highway condemnation may look to either the Fifth Amendment right (as interpreted by the U. S. Supreme Court), or to his state constitution (as interpreted by his state supreme court) for relief.

There are two kinds of state "just compensation" guarantees. In approximately thirty states, the right applies only to property "taken". In the remaining states compensation must be made for property "taken or damaged." Article I,

Section II of Virginia's 1971 Constitution is a typical "just compensation" clause; it includes the "damaging" provision:

> The General Assembly. . .shall not pass any law whereby private property shall be taken or damaged for public uses, without just compensation. . . .

2. "Physical Encroachment" as Required by State Courts

The state courts, perhaps even more than the federal courts, have been reluctant to require compensation for "incidental" ("consequential") damages. The clarity of New York Court of Appeals statement of the doctrine in Bennett v. Long Island R. R., 181 N.Y. 431, 74 N.E. 418 (1950), renders it particularly suitable for quotation, and the case has been frequently cited as authority on the question of consequential damages. In Bennett, the Long Island Railroad built a steam railroad on right-of-way abutting the plaintiff-landowner's property. The landowner operated a store on his land. It was found as a matter of fact in the trial court that "the running of defendant's cars over such elevated structure is accompanied by unusual noise, smoke and casting of soot and cinders over and beyond. . .the level theretofore existing," and that the elevated railway precluded the public's view of the store.(23) The landowner brought suit for damages on a nuisance theory. While a constitutional argument as such was not advanced, such an argument was implicitly rejected; the same rationale for denying recovery has traditionally been given in both the nuisance and condemnation situations. The Bennett court's expression of that rationale is as follows:

> . . .the rumble of trains, the clanging of bells, the shriek of whistles, the blowing off of steam, the discordant squeak of wheels in going around curve, the emission of smoke, soot and cinders, all of which accompany the operation of steam cars, are undoubtedly nuisances to the neighboring dwellings in the popular sense, but, as they are necessarily incident to the maintenance of the road, they do not constitute nuisances in the legal sense, but are regarded as protected by the legislative authority which created the corporation and legalized its corporate operations. Nor does the legal nature of such annoyances change as traffic increases them in volume and extent.(24)

Applying Bennett reasoning, the state courts have generally held to the requirement of an actual physical infringement; the underlying assumption is that to enlarge the compensation standard would "open the floodgates," bringing government construction to a halt.

3. The History of "Damaging" Clauses

During the period from about 1880 to 1910 there developed widespread complaint about the unjust failure of the states to compensate landowners for damages caused by changes of grade and permanent loss of access brought about by highway construction; these damages had been denied because they were not "physical takings" of property. Several states therefore enacted "damaging" clauses in their constitutions to correct these problems. Illinois was the first state to do so; several other states followed suit, including Virginia in its 1902 Revised Constitution.

Supporters of the new "damaging" clauses had hoped for a broad interpretation which would require compensation for all substantial indirect damages. It became clear as the interpreting decisions came down, however, that the new clauses would be construed narrowly; only the change of grade and loss of access damages were covered. (See below for an account of Virginia's "damaging" interpretations.) Other kinds of nonphysical injury, even if serious, were not considered by the courts to be legally "damaged". The reformers' victories turned out to be very limited.

4. Recent Highway Cases Applying the Narrow Construction of "Just Compensation" Requirements

The "doctrine of noncompensability for consequential damages," as suggested above, has been widely applied in highway cases. Gardner v. Bailey, 128 W. Va. 331, 36 S. E. 2d 215 (1945), is representative. In that case, the West Virginia Highway Department relocated a highway from the front to the rear of the plaintiff's home. She claimed that this resulted in a denial of a reasonable means of access, that water was diverted to her property, that it caused dust, dirt, filth and rubble to collect on the property, and that she was deprived of access to a nearby river.

This plea fell on a deaf judicial ear. The West Virginia Supreme Court noted that it is common knowledge that relocation will cause some persons to be disadvantaged (it recognized, for example, that some businesses will be left to wither), but held that such damages were noncompensable. "Not every real

damage is compensable. . . ."[25] "No authority has been cited for the proposition that the State should pay compensation on account of noise, dust or other inconvenience suffered through the location of a state highway. . . ."[26]

The California Supreme Court reaffirmed that state's indirect damages rule in People ex. rel. Dept. of Public Works v. Symons, 54 Cal. Reptr. 363, 357 P. 2d 451 (1960). The doctrine of noncompensability stands out with particular clarity in Symons because of the peculiar facts involved. California constructed a freeway on land abutting Symons' land. While not taking any of Symons' property for the freeway itself, the state did condemn a portion of Symons' lot for the purpose of building a cul-de-sac on a street cut off by the freeway. Symons brought a suit claiming that he should be compensated not only for the land actually taken for the cul-de-sac, but also for indirect damages to his property from the freeway. He argued that the "physical taking" requirement was met, since the cul-de-sac was really a part of the freeway project. He alleged that the freeway caused a loss of privacy, loss of view, loss of access, loss of quiet residential atmosphere, misorientation of the house, and considerable amounts of noise, fumes and dust.

Even here, where the court had an opportunity to make what seemed to be a very reasonable and modest expansion of the compensation law, it declined to do so. It reiterated the traditional rule that only the value of the property physically taken and the damage to the residue caused by that taking were compensable. "It is established that when a public improvement is made on property adjoining that of one who claims to be damaged by such general factors similar to the damages claimed in the instant case, there can be no recovery where there has been no actual taking of severance of the claimant's property."[27] In the court's view, only damage to the property itself is compensable, while infringement of the owner's "personal pleasure or enjoyment"[28] is not. "Merely rendering the property less desirable for certain purposes, or even causing personal annoyance or discomfort" is not sufficient to justify compensation.[29]

The relatively recent case of Northcutt v. State Road Dept. of Florida, 209 So. 2d 710 (1968) provides an affirmation of noncompensability in that state and is of particular interest because of the extensive damage involved. An expressway carrying heavy industrial and commercial traffic was constructed very close to (though not abutting) the plaintiff's residence. The plaintiff claimed that the effect of the traffic and the heavy construction equipment was to make his house structurally unsound and uninhabitable. The "excessive shock waves, vibrations, and noises, at all hours of the day and night"[30] caused the plaintiff and his family to lose sleep, become ill and nervous, and deprived them of aesthetic values. For these reasons the property could not be sold or financed for any purpose. The Florida Supreme Court denied relief, stating the Florida doctrine that compensability requires a "trespass or physical invasion."[31]

Pointing out that the plaintiff is in a common situation with thousands of fellow citizens who don't complain, and that highway budgetary planning would be "impossible" if the plaintiff were permitted to recover, the court held to the traditional rule.

The 1968 California case of Lombardy v. Peter Kiewit and Sons Co., 72 Cal. Reptr. 240 (1968) also denied relief in spite of rather drastic damages. As the result of the construction and operation of a new freeway close to the plaintiff's home, he and his family were "subjected to noxious fumes, loud noises, dust laden air, shocks and vibrations, imminent hazards from foreseeable accidents and collisions on the freeway, and mental, physical and emotional distress resulting therefrom."(32) More specifically, the plaintiff suffered "loss of sleep, eye irritation, difficulty in breathing, difficulty in hearing conversations and broadcasts"(33) and these problems had been an "unceasing source of worry, disturbance and irritation."(34)

The California Supreme Court denied recovery, stating the rule to be that there should be no recovery in inverse condemnations unless there is substantial damage to the property itself. It could find no such physical, substantial damage in Lombardy. In California (and most other jurisdictions) the "roar, shock of screeching brakes, smoke, and fumes"(35) must be tolerated.

5. The Virginia Case Law on Indirect Damages

Virginia adheres to the majority rule: damage to a landowner does not have to be compensated for unless there is a physical taking. (This is qualified only by the usual very narrow change of grade and loss of access exceptions.) A brief account of the Virginia cases on this issue in instructive and adds perspective to the question of compensation for indirect damages.

In 1902, Virginia (following the example of Illinois) amended Section 58 of its constitution, adding the phrase "or damaged" to the provision that "The General Assembly. . . shall not enact any law whereby private property shall be taken or damaged for public uses. . . ." Article IV, Section 58, 1902 Constitution of Virginia (The reason for this change was widespread public dissatisfaction about the state's failure to compensate for "consequential damages," particularly in change of grade and loss of access situations.)

The first significant Virginia case interpreting the new "damaging" clause was Swift and Co. v. Newport News, 105 Va. 108, 52 S.E. 821 (1906). In that case the City of Newport News repaved and regraded the road in front of Swift's wholesale meat shop, which had basement windows with window shafts. As a result of the construction, the road was raised seven inches, leaving Swift's building

and lot seven inches below grade. While denying Swift relief because it was determined that he had in fact not suffered damage, the Virginia Supreme Court indicated that it would construe the new "damaging" provision broadly, and that the Constitution presumably would require compensation for any substantial damage caused by government regardless of the kind of damage done. "It was the design of the amendment. . .to remove an existing mischief, viz: the damaging of private property for public use without just compensation. . . ." (36) The court then quoted approvingly from the U. S. Supreme Court in Chicago v. Taylor, 125 U.S. 166, which construed the Illinois "damaging" clause:

> It. . .indicated a deliberate purpose to make a change. . .and abolish the old test of direct physical injury to the corpus or subject of the property affected. . . the new rule (requires). . .compensation. . .where. . . there has been some physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property. . .and that by reason of such distrubance he has sustained a special damage. . . to his property, in excess of that sustained by the public generally. . .(in) conclusion. . .recovery may be had. . . where. . .(there is) substantial damage. . .(and compensation) does not require. . .actual physical invasion. (37)

Thus, in the first major opinion on the new constitutional provision, the Virginia Supreme Court appeared to consider any "substantial" damaging from whatever cause to be constitutionally compensable.

One year after the Swift decision, the meaning of the "damaging" clause was again at issue before the Virginia Supreme Court in Tidewater Railway Co. v. Shartzer, 107 Va. 562, 59 S.E. 407 (1907). The railroad constructed a new facility on right-of-way abutting Shartzer's property. Shartzer, who owned a business and a dwelling on his property, claimed that he was entitled under the new Section 58 compensation for damage resulting from noise, smoke, gases, vibrations and the danger of fire. The court agreed, "recognizing that the changes made by the Constitutional Convention were designed to enlarge the right to compensation. . .it would seem that the language employed in the (new) Constitution . . .should be held to embrace and give remedy for every physical injury to property, whether by noise, smoke, gases, vibrations, or otherwise." (38) Even more plainly than in Swift, the court appeared to have interpreted the "damaging" provision to cover any substantial damage. Here in Tidewater the court actually awarded damages for indirect injuries not within the change of grade and loss of access categories. The doctrine of noncompensation for indirect damages appeared to have been buried in Tidewater (1907).

Tidewater, however, was the high water mark, and the legal tide began to recede shortly after that decision. In the confused 1908 case of Lambert v. City of Norfolk, 108 Va. 259, 61 S.E. 776, Mrs. Lambert sued the city for damages to her property value resulting from the construction of a cemetery across the street. The court denied recovery, and the language used by the court was a significant weathervane of future interpretations of the "damaging" clause. The Lambert court took great care to point out that not even the Tidewater opinion recognized every diminution in value to be compensable. Lambert quoted the Tidewater opinion: the "mere infringement of the owner's pleasure or enjoyment"(39) was insufficient to make it compensable; the "property itself must suffer some diminution in substance" or be "rendered intrinsically less valuable."(40) There must be damage to some right "appurtenant to the property."(41)

While the Lambert opinion at one point characterized noise, smoke, gases and vibrations as physical interferences(42) which must be compensated under the Tidewater doctrine, the bulk of the opinion stresses the requirement of "physical damage to the corpus or some right of property appurtenant thereto."(43) "The meaning of the word 'damaged' was neither enlarged nor restricted by the Constitution. . .there must be physical damage to the corpus. . . ."(44) The court pointed out that Mrs. Lambert's case was based merely on diminished market value and that, held the court, was certainly not sufficient to show a constitutional damaging.

In sum, the Lambert decision took a much narrower view of the "damaging" clause. While it did allow for an exception where the owner was not physically affected, but was "specially affected — that is, in a manner not common to the property owner and the public at large,"(45) this amounted to no more than the old change of grade and loss of access exceptions. In other words, the old doctrine of noncompensability for indirect damages was back in effect. This conclusion is borne out by history, since no case in Virginia since Tidewater has awarded compensation for injury solely from noise, vibration, gases, and smoke.

### C. A Short Summary of the Law of Indirect Damages and the Resulting Inequities

It is important to remember that the discussion above pertains to the law of indirect damages where there is no physical taking. If, on the other hand, even a small part of land is physically taken, then the landowner may recover the full amount of damage to the remaining property, regardless how the damage occurs.

The inequity which can result from the present law is best shown by an example. Assume the state is constructing a multilane highway through the area in which landowners A and B live. A and B both own $200,000 estates with the residences only 10 feet from the property line on the side toward the new highway. Assume also that the property value of both estates is reduced to $25,000 because of the noise, dust, and danger from the highway. If the highway department takes a sliver (say a one inch strip on the highway side) of A's land, the department must compensate him $175,000 plus the value of the one-inch strip. If at the same time the highway merely abuts B and no part of his land is actually taken the state owes him nothing; he must suffer the $175,000 loss.

This example presents an extreme case, of course, but many similar, if lesser, inequities do occur. It is very difficult to justify why the difference of one inch in the location of the highway should be completely dispositive of the issue of compensation to the surrounding landowners. One old argument which has been used to justify the existing rule is that noise, dust and shock damages are too speculative, and that because of these difficulties in evaluation the court should simply refuse to get involved. But the argument is obviously not valid, since the courts determine such damages in remainder situations daily.

It is also important to remember that the law of compensation does not always determine whether a landowner will receive damages. A fair highway department which is concerned with the rights of individual citizens would condemn and compensate a landowner in the situation described above. This may be troublesome even for a well-meaning agency, however, since an agency which is not legally obligated to condemn property for a project may not be authorized to do so. In this connection, see the discussion of the new federal noise regulations in Section VI.

## III. THE LIBERALIZATION OF COMPENSATION IN AIRCRAFT CASES, 1946 TO PRESENT

The case of United States v. Causby, 328 U.S. 256, 55 S.Ct. 1062, 90 L.Ed. 1206 (1946) involved the suit of a chicken farm owner against the government for damages caused by military aircraft which were constantly landing and taking off from a nearby airfield. The treetop level flights brought a startling noise and sudden illumination which had caused 150 chickens to be killed by flying into a wall. The property was thus destroyed as a commercial chicken farm. Furthermore, several air accidents had occurred in the area, and the overflights caused the owner to lose sleep, and to become frightened and nervous. The U. S. Supreme Court held that these facts warranted compensation to the owner.

This decision was novel in airplane case law. As noted by the court in its opinion,(46) the inconveniences of aircraft overflights are not normally compensable under the Fifth Amendment; the ancient doctrine that "land ownership extends to the heavens" had long since been changed to meet the realities of the air age. But here, the court was faced with the question: Is there no overflight which would be so damaging as to fall under the Fifth Amendment? The court reasoned that if the owner's land is rendered completely uninhabitable, it would be a "taking" as a "special and peculiar damage," just as the exhaust fans in Richards v. Washington Terminal Co., supra, constituted a "taking" because of the "special and peculiar" damage. In Causby, however, property was not rendered completely uninhabitable, but only substantially so. Was this a "taking"? The court held that it was. "The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land."(47) The opinion pointed out that if an elevated railway were to be put at the same height as the planes were flying, there would doubtless be a "taking". The court's summation of the law on this point: ". . .flights over private land are not a taking unless they are so low and so frequent as to be a direct and immediate interference."(48) It should be noted that Causby was decided on a trespass theory, and would not therefore automatically apply to a neighboring landowner who was equally damaged, but whose property was not actually and directly overflown by the aircraft. Still, the Causby was a novel decision. It introduced the somewhat fuzzy test of "direct and immediate interference" as the measure of a "taking".

Just how far the Causby doctrine would be taken was at issue in Nunnally v. United States, 239 F. 2d 521 (1956), decided by the Fourth U. S. Circuit Court of Appeals. The plaintiff was a doctor who owned an island used for recreation. Two U. S. military proving ground targets were located 3,000 feet and 7,000 feet from his island. Explosives were detonated on these targets on 399 days during a six and a half year period. The plaintiff, claiming that his island was no longer useful for recreation, filed suit for compensation. Admitting that he must show

a physical invasion to qualify for compensation, the doctor claimed that noise and shock from the detonations constituted a "physical invasion." The argument was rejected by the court. The court pointed out that there were no special, peculiar damages as in Causby, and that the proving ground offices and residences were just as close as the plaintiff's island. In denying recovery, the court stressed the importance of preserving the distinction between "taking" in the constitutional sense, and "mere consequential damage."

Other cases, however, fell into the Causby "taking" category. Most of these were marked by serious damaging. For example, in Griggs v. Allegheny County, 369 U.S. 84, S.Ct. 531, 7 L.Ed. 2d 585 (1962), in which compensation was granted, the plaintiff lived 3,259 feet from a runway. Frequent commercial flights on takeoff passed as low as 53 feet above his house. The owner alleged that the noise was like a riveting machine or steam hammer, that plaster fell and windows rattled, that it was impossible to sleep even with pills and ear plugs, and that it was impossible to carry on a conversation on the phone.

The question of whether a neighboring property owner was entitled to compensation was raised in Batten v. United States, 306 F. 2d 580, (10th Circuit, 1962) cert. denied, 371 U.S. 955, rehearing denied, 372 U.S. 925 (1963). The plaintiff lived adjacent to Forbes Field in Kansas, which was expanded to include facilities for six-engine jets. There were one hundred of these jet flights daily; none of them, however, flew directly over the plaintiff's property. In addition to the flights, these jets were constantly tested at a nearby maintenance pad where they were run for extended periods at 50-100% power. At 100% power the engines produced 90-111 decibles of noise at the plaintiff's home. During the summer months, a special fuel mixture used by the jets caused large amounts of black smoke, which settled on the plaintiff's residence and laundry. These combined effects caused a 41-55% loss in property value.

The Batten court denied recovery. It pointed out that Causby was decided on a trespass theory (direct overflights) and that there was no such trespass in this case. It also distinguished Richards v. Washington Terminal Co., supra, holding that there were no special or peculiar damages in Batten as the fans caused in Richards. The court found this to be only a neighborhood inconvenience, and that the jets' harmful activities were not directed toward the plaintiff; since the government did not assume complete dominion over the property, there was no Fifth Amendment "taking".

The Batten decision was accompanied by a vigorous dissenting opinion by Chief Justice Murrah, who expressed the belief that a physical invasion should not be a requirement for a constitutional "taking". He thought the test should be a simple one: When is the interference sufficiently direct and peculiar, and of

such magnitude, that in fairness and justice, the state, instead of the individual, should bear the loss?[49] Chief Justice Murrah argues that his test is no more ambiguous than the existing one; what, after all, is "complete destruction"? Is it when windows rattle, or when they fall out? When smoke suffocates, or only causes a cough? He felt that in Batten the property value was at least substantially impaired, and should be constitutionally protected.

Shortly after Justice Murrah wrote his dissent in Batten (10th U. S. Circuit Court of Appeals) the policy he expounded was adopted by the Oregon Supreme Court in Thornburg v. Port of Portland, 233 Ore. 178, 376 P. 2d 100 (1962). Thornburg lived close to Portland International Airport, but the planes did not fly directly over his property, which was approximately 1,000 feet from the glide path. He nevertheless suffered damage and brought an inverse condemnation action for compensation. The trial court had denied relief since it had proceeded on the trespass theory, but the landowner urged a nuisance theory upon the court as the proper test of whether there is a "taking". The Oregon court, in accepting the plaintiff's argument, quoted Chief Justice Murrah's Batten dissent with approval.

The court felt that where there are recognized substantial damages from a governmental activity, public policy must justify the denial of relief. It found no such justification in Thornburg. The court reasoned that if noise is a nuisance, and if noise coming straight down (Causby) can ripen into a taking if aggravated enough, the damage from another direction should be equally compensable.[50] The real question, said the court, is not the perpendicular extension of boundaries into space, but reasonableness; "in effect, the inquiry should have been whether the government had undertaken a course of conduct on its own land which, in simple fairness to its neighbors, required it to obtain more land so that the substantial burdens of the activity would fall upon the public land, rather than upon that of involuntary contributors who happen to lie in the path of progress."[51] The court found it ridiculous to resolve the matter on the basis of whether the aircraft flies directly over or slightly to the side of the property.

Two years after the Thornburg decision, the State of Washington adopted the same policy in Martin v. Port of Seattle, 64 Wash. 2d 324, 391 P. 2d 540 (1964), cert. denied 379 U.S. 989 (1965). The facts were similar to Thornburg; the plaintiff lived near an airport and suffered extensive damage from jet aircraft operations, but did not live directly under the flights. The noise and vibration frightened the children, interrupted conversation and TV broadcasts, and made it difficult to sleep.

At times the noise was painful. Nails in the side of the house had to be hammered back in at six-month intervals. The Washington court's decision: "We are unable to accept the premise that recovery for interference with the use

of land should depend upon anything as irrelevant as whether the wing tip of the aircraft passes through some fraction of an inch of the airspace directly above the plaintiff's land."(52) The court expressed the opinion that Causby and Griggs were actually based solely on noise and vibration, regardless of the trespass arguments made in those cases. The Washington court thought that Chief Justice Murrah's dissent in Batten probably represented the position of the U. S. Supreme Court.(53) Furthermore, the court questioned the value of "substantial interference" as the test of a "taking"; it thought the test should be merely the existence of injury to market value; "surely the protection of the public interest does not entail the refusal of small claims on the ground that the burden to the public is not great enough to pay for."(54)

It is important to remember that only two states (Oregon in Thornburg and Washington in Martin) have accepted the more liberal test in airplane cases. The Causby, Thornburg, and Martin developments, however, have been discussed widely in the legal profession, and the new trend is approved by most commentators. There is also substantial sympathy for the new standard on the bench, as is seen in Chief Justice Murrah's Batten dissent. It therefore seems very likely that more courts will adopt some version of the "substantial interference" test in the future.

## IV. DAHLIN: THE LIBERAL AIRCRAFT STANDARD APPLIED IN A HIGHWAY CASE

The implications of the aircraft cases on highway law are obvious. If a property owner is damaged, it makes little difference to him whether it was an airport or a highway which did the deed. It is difficult to justify a recovery in the one case while denying it in the other.

Since Causby, and particularly since Thornburg, it has been anticipated that the liberal standard would be extended to highway law. This finally occurred in 1971 in City of Yakima v. Dahlin, 5 Wn.App. 129, 485 P. 2d 628, decided by the State of Washington Supreme Court. Dahlin owned a warehouse in Yakima. In constructing a new expressway adjacent to his building, the government took the existing sidewalk and parking lane. The expressway consisted of an overpass, carrying traffic in one direction, and a ground level lane carrying it in the other. The ground level lane came within a foot and a half of Dahlin's building. The overpass was fifteen feet from the warehouse. The court found that this arrangement created a "reverberant buildup of noise. . . .excessive and oppressive noise" and created an "echo chamber effect" which was "intolerable".(55) This the court found to be "special and peculiar" damage and required compensation.

It cannot be certain what use will be made of Dahlin in future opinions. It is possible, for example, that the case will merely be limited to its facts, and that the damage suffered in Dahlin will be relegated to the old very narrow "special and peculiar" category along with the exhaust fans in Richards v. Washington Terminal Co. But the Dahlin court's broad language and its specific reliance on Martin v. Port of Seattle(56) make it likely that Dahlin will be widely cited as the precedent for applying a liberal "substantial interference" test in highway cases.

## V. FHWA NOISE STANDARDS ON FEDERAL AID PROJECTS

In June 1973 the Federal Highway Administration promulgated noise standards which must be designed into all future federal-aid highways. Although the primary purpose of this report is to assess the case law of compensation, the report would not be complete without a brief summary of these very important new regulations.

The regulations are set out in the Code of Federal Regulations, Title 23, Chapter I, Subchapter J, Part 772. (See also the Interim Noise Procedures and Standards for existing highways at Federal Register, Vol. 39, No. 37, Friday, February 22, 1974.) The purpose of the regulations is to set maximum allowable noise levels for various land uses, and to authorize the participation of federal funds in noise abatement projects which are necessary to meet the required standards. The basic noise standards are set out in the following table, which is taken from §772.3 of the C.F.R. citation above.

| Land Use Category | Maximum Allowable Noise Level (dBA) | Description of Land Use Category |
|---|---|---|
| A | 60 (Exterior) | Tracts of lands in which serenity and quiet are of extraordinary significance and serve an important public need, and where the preservation of those qualities is essential if the area is to continue to serve its intended purpose. Such areas could include amphitheaters, particular parks or portions of parks, or open spaces which are dedicated or recognized by appropriate local officials for activities requiring special qualities or serenity and quiet. |
| B | 70 (Exterior) | Residences, motels, hotels, public meeting rooms, schools, churches, libraries, hospitals, picnic areas, recreation areas, playgrounds, active sports areas, and parks. |

| Land Use Category | Maximum Allowable Noise Level (dBA) | Description of Land Use Category |
|---|---|---|
| C | 75 (Exterior) | Developed lands, properties or activities not included in categories A and B of this subparagraph. |
| D | | For requirements on undeveloped lands see §772.5(a) (5) and (6). |
| E | 55 (Interior) | Residences, motels, hotels, public meeting rooms, schools, churches, libraries, hospitals, and auditoriums. |

It should be noted that serious noise damage from highways will not be completely eliminated. First, the regulations do not apply to state projects in which federal funds are used (although the widespread familiarity with the federal standards is likely to be reflected throughout state highway planning). Second, the federal regulations provide for exceptions in cases where noise abatement would be impossible, impracticable, prohibitively expensive, or where noise abatement would conflict with other factors such as esthetics, highway safety or air quality. Therefore, there will continue to be situations where property values are substantially impaired by highway noise and the issue of "just compensation" to the landowner must be determined by the courts. Despite these limitations, however, it is obvious that the new federal standards will sharply reduce both the number and degree of noise damage situations. Of course the cost of noise standard compliance, perhaps even more than the liberalized compensation required by the courts, will be reflected in increased right-of-way costs.

FOOTNOTES

1. West v. Chesapeake and Potomac Tel. Co., 295 U.S. 662 (at 671), 79 L.Ed. 1640, 55 S.Ct. 894; see also DeSalvo v. Arkansas Louisiana Gas Co., 239 F.Supp. 312 for a full discussion of this point.

2. Gibson v. United States, 166 U.S. 269 (1897) at 275.

3. Ibid., at 275.

4. United States v. Cress, 243 U.S. 316 (1917) at 328.

5. United States v. Willow River Power Co., 324 U.S. 499 (1945) at 502.

6. Ibid., at 502.

7. Ibid., at 510.

8. Transportation Co. v. Chicago, 99 U.S. 635 (1879) at 641.

9. Ibid., at 640.

10. Ibid., at 642.

11. Ibid., at 642.

12. Ibid., at 642.

13. Ibid., at 641.

14. Ibid., at 642.

15. Richards v. Washington Terminal Co., 233 U.S. 546 (1914) at 553.

16. Ibid., at 551.

17. Ibid., at 552.

18. Ibid., at 554.

19. Ibid., at 554.

20. Ibid., at 555.

21. Ibid., at 555.

22. Ibid., at 553.

23. Bennett v. Long Island Railroad, 181 N.Y. 431, 74 N.E. 318 (1905) at 419.

24. Ibid., at 420.

25. Gardner v. Bailey, 128 W.Va. 331, 36 S.E. 2d 205 (1945) at 218.

26. Ibid., at 219.

27. People ex. rel. Dept. of Public Works v. Symons, 54 Cal. 2d 855, 357 P. 2d 451, 9 Cal. Reptr. 363 (1960) at 366.

28. Ibid., at 365.

29. Ibid., at 365.

30. Northcutt v. State Road Dept. of Florida, 209 So. 2d 710 (1968) at 711.

31. Ibid., at 712.

32. Lombardy v. Peter Kiewit and Sons Co., 72 Cal. Reptr. 240 (1968) at 242.

33. Ibid., at 242.

34. Ibid., at 242.

35. Ibid., at 242.

36. Swift and Co. v. Newport News, 105 Va. 108 (1906) at 114. (52 S.E. 821, 3 L.R.A. (N.S.) 404.)

37. Ibid., at 117.

38. Tidewater R. Co. v. Shartzer, 59 S.E. 407 (1907) at 407. (107 Va. 562, 17 L.R.A. (N.S.) 1053.)

39. Lambert v. City of Norfolk, 108 Va. 259 (1908) at 260. (61 S.E. 776 128 Am. St. Rep. 945, 17 L.R.A. (N.S.) 1061.)

40. Ibid., at 260.

41. Ibid., at 260.

42. Ibid., at 260.

43. Ibid., at 261.

44. Ibid., at 261.

45. Ibid., at 261.

46. United States v. Causby, 328 U.So. 256 (1946) at 266. (66 S. Ct. 1062, 90 L. Ed. 1206.)

47. Ibid., at 264.

48. Ibid., at 266.

49. Batten v. United States, 306 F. 2d 580 (10th Cir. 1962) at 584 cert. denied, 371 U.S. 955, rehearing denied, 372 U.S. 925 (1963).

50. Thornburg v. Port of Portland, 233 Ore. 178, 376 P. 2d 100 (1962) at 105.

51. Ibid., at 107.

52. Martin v. Port of Seattle, 64 Wash. 2d 391 P. 2d 540 (1964) at 545.

53. Ibid., at 546.

54. Ibid., at 547.

55. City of Yakima v. Dahlin, 5 Wn. App. 129, 485 P. 2d 628 (1971) at 630.

56. Ibid., at 630.