Volume 63
Issue 2 *Dickinson Law Review - Volume 63, 1958-1959*

1-1-1959

Pennsylvania Limited Access Highway Law

Thomas A. Beckley

COMMENTS

PENNSYLVANIA LIMITED ACCESS HIGHWAY LAW

Since motor vehicle traffic in the United States has increased enormously in the last two decades, highway congestion and accidents have become continually more burdensome. Analysis of statistical computations indicates that control of access to highways offers a significant method by which these problems can be alleviated.[1] Accordingly, various states including Pennsylvania have enacted legislation authorizing the establishment of limited access highways. The Pennsylvania Limited Access Highway Law [2] has recently been declared unconstitutional, by a Federal District Court in *Creasy v. Stevens,* 160 F. Supp. 404 (1958).

The particular section of the Act disputed reads:

> "For the purpose of *constructing* limited highways, local service highways,[3] or intersection streets or roads, *the Secretary of Highways is hereby empowered to take property and pay damages therefor as herein provided. . . .* The owner or owners of private property affected by the construction or designation of a limited access highway or local service highway or by a change of the width or lines of any intersecting streets or roads shall be *entitled only to damages from an actual taking of property. The Commonwealth shall not be liable for consequential damages where no property is taken."* [4] (emphasis added.)

The Act was initially challenged in the United States District Court, Western District of Pennsylvania, by owners and occupants of property abutting on a free access highway under control of Allegheny County which was to be designated a limited access highway by the Commonwealth. The plain-

---

[1] Accident Experience on Controlled Access Highways, Circular Memorandum to Division Engineers from the Acting Deputy Commissioner, Department of Commerce, Bureau of Public Roads, April 25, 1955; National Research Council, Highway Research Board, Expressway Law 8 (1957).

[2] Act of May 29, 1945, P.L. 1108, as amended, Act of June 10, 1947, P.L. 481, § 1. Act of May 31, 1957, P. L. 234, No. 111, § 1; PA. STAT. ANN. tit. 36, §§ 2391.1-2391.15. Section one of the Act of 1945 defines a limited access highway as a "public highway to which owners or occupants of abutting property or the traveling public have no right of ingress or egress to, from or across such highway, except as may be provided by the authorities responsible therefor."

[3] "A local service highway is defined as a public highway, either existing or new, or combination thereof, parallel or approximately parallel to the limited access highway which will provide ingress or egress to or from highways or areas which would otherwise be isolated by the construction or establishment of a limited access highway." Act of May 29, 1945, P.L. 1108, § 1; PA. STAT. ANN. tit. 36, § 2391.1.

[4] Act of May 29, 1945, P.L. 1108, § 8, as amended, Act of June 10, 1947, P.L. 481, § 1; PA. STAT. ANN. tit. 36, § 2391.8.

tiffs sought to permanently enjoin the State from designating the highway as one of limited access on the ground that to do so would be violative of the Fourteenth Amendment of the United States Constitution. The District Court, reluctant to resolve the constitutional issue before the courts of the Commonwealth of Pennsylvania construed the statute, granted a temporary injunction and stayed the proceedings pending outcome of litigation in the state courts.

Accordingly, the plaintiffs initiated identical action in the Court of Common Pleas of Dauphin County, Pennsylvania.[5] This court, on preliminary objections by defendants, dismissed the plaintiffs' action, holding that under Section 8 of the statute they were afforded an adequate remedy at law to test their right to damages, if any, before a board of viewers. The court, thus, side-stepped the pivotal issue of whether the plaintiffs were entitled to damages under that section and decided the matter on a purely procedural point. The plaintiffs appealed to the Supreme Court of Pennsylvania and the decision was affirmed per curiam.[6]

Subsequently, the plaintiffs returned to the District Court and filed a motion for a permanent injunction to prevent the defendants from enforcing the statute. On the same day, defendants moved to dissolve the temporary injunction and dismiss the complaint. The Court assumed jurisdiction stating:

> ". . . were we to refuse to exercise our jurisdiction, the plaintiffs would suffer substantial financial losses during the time it would take to litigate the constitutionality of the statute in the State Courts, which losses could never be recouped if the statute were eventually declared to be unconstitutional. In that event the plaintiffs would be irreparably harmed." [7]

As authority the court cited *Toomer v. Witsell,*[8] a comparable case involving a state statute which required a license for trawling in South Carolina waters. Trawling without the license subjected the plaintiffs to criminal penalties. If they did pay the substantial licensing fee, however, there was no provision by which they could later recover the amount paid. Section 9 of the Pennsylvania Act presently under consideration provides for imposition of a fine or imprisonment for violation of traffic control established for a limited access highway. The two situations are analogous.

Having assumed jurisdiction, the Court proceeded to discuss the merits of the case. The plaintiffs contended that if the highway is declared a limited

[5] Creasy v. Lawler, 8 D. & C. 2d 535 (1956); Defendant Stevens succeeded Lawler as Secretary of Highways.
[6] Creasy v. Lawler, 389 Pa. 635, 133 A.2d 178 (1957).
[7] Creasy v. Stevens, 160 F. Supp. at 409 (1958).
[8] 73 F. Supp. 371, 334 U.S. 385 (1948).

access highway by authority of the statute the resultant total destruction of their right of access would constitute a "taking" under eminent domain and, consequently, impose a duty upon the Commonwealth to pay them compensation. The defendants, on the other hand, contended that the statute was only proper exercise of police power and even though the property rights of the plaintiffs were destroyed by action under the statute there would be no duty on the Commonwealth under the Fourteenth Amendment of the Constitution of the United States to pay them compensation.

The District Court did not consider the complete deprivation by law of the right of access as being within the principle of "damnum absque injuria," but rather concluded that deprivation of the plaintiffs' access to the highway would constitute a "taking" of property in the constitutional sense. This could be done under the Commonwealth's power of eminent domain and the plaintiffs would be entitled to compensation. Further, examining the statute in light of previous pertinent decisions of the Pennsylvania Supreme Court, the Court determined that the Pennsylvania Legislature did not intend to compensate abutting landowners whose right of access would be destroyed but whose land would not actually be taken. The statute was found repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States and the defendants were permanently enjoined from enforcing it over the plaintiffs' protest.[9]

The development of the law in Pennsylvania has followed a relatively normal pattern in the general area of eminent domain and police power. It is the law in Pennsylvania, as elsewhere, that private property shall not be taken without just compensation first being made or secured.[10] Additionally, the Courts of the Commonwealth have gone even further and established that there need not be an actual physical seizure to constitute a "taking." [11] However, the universally accepted rule is that private property may be regulated by police power to a certain extent without a "taking" occurring which gives rise to compensatory remuneration. This rule itself is limited, however, in that if the regulation goes too far it also will be declared a "taking" and the

[9] Other issues raised, such as the "Six Per Cent Rule," are not within the scope of this comment.

[10] PA. CONST., art. IX, § 1.

[11] Gardner v. Allegheny County, 382 Pa. 88, 114 A.2d 491 (1955). Here the court held that flights of aircraft which are so low and so frequent as to be a direct and immediate interference with the use and enjoyment of the land would amount to a "taking" of the land; see also, Miller v. City of Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951). A city ordinance denying compensation for improvements on land subsequent to its being included in any planned park or parkway coupled with the city council's adoption of such a plan held to constitute a "taking" even though physical seizure had not been made.

payment of damages will become mandatory.[12] Pennsylvania is in line with the majority view in this general area.

The *Creasy* case raised no problem as to whether access is a property right. The great weight of authority in the United States is that an abutting property owner's right of access to an existent public street or highway is a property right. The majority also maintain that this right cannot be "taken" without compensation being paid.[13] The Supreme Court of the United States has adopted this view in saying:

> "The General Doctrine is correctly stated in Dillon on Municipal Corporations: 'For example, an abutting owner's right of access to and from the street, subject only to legitimate public regulation, is as much his property as his right to the soil within his boundary lines. . . . When he is deprived of such right of access, or of any other easement connected with the use and enjoyment of his property, other than by legitimate public regulation, he is deprived of his property.' " [14]

It must be noted that the above refers only to toal deprivation. It does not preclude limitation of location, size or number of accesses without payment for limitations so imposed. The Supreme Court of Pennsylvania recognized this right to control without payment of compensation in the case of *Farmers-Kessinger Market House Co. v. Reading*.[15] There the city prohibited an abutting property owner from constructing a driveway over a sidewalk in order to gain access to one of the city's main thoroughfares. The Court held that there was not a compensable "taking" but only a legitimate regulation through exercise of police power because the property owner had access to a parallel street on the other end of his property. The Court did recognize, however, that, "If the City of Reading were attempting to deny plaintiff's property all vehicular ingress and egress, the reasonableness of its act might be justly questioned. . . ." [16]

While Pennsylvania recognizes access as a property right, it has adopted a unique approach as to the manner of treating it. The Supreme Court of Pennsylvania has held that where there have been damages in cases of highway improvement, there must have been an actual "taking" of the complaining property owner's land before the Commonwealth can be made to answer.[17]

---

[12] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Delaware, L. & W. R. R. v. Town of Morristown, 276 U.S. 182 (1928).

[13] For a collection of cases, see 18 AM. JUR., *Eminent Domain*, §§ 183-5 (1938); 29 C.J.S., *Eminent Domain*, § 105 (1941).

[14] Donovan v. Pennsylvania Co., 199 U.S. 279, 302 (1905).

[15] 310 Pa. 493, 165 Atl. 398 (1933).

[16] *Id.* at 501-502, 165 Atl. at 402.

[17] Koontz v. Commonwealth, 364 Pa. 145, 70 A.2d 308 (1950); see also State Highway Law of Pennsylvania, Act of June 1, 1945, P.L. 1242, art. III, § 304.

When access rights have been destroyed without land actually having been "taken", the losses are referred to as "consequential damages" for which the Commonwealth is generally not responsible. In short, Pennsylvania recognizes this right but where the Commonwealth causes its deprivation, remedy generally can only be had if there is a connected "taking" of land. Where, therefore, an abutting property owner's right of access to an existent public way happens to be cut off by the Commonwealth he is likely to find himself with no remedy whatsoever.

A retrospective glance should serve to clarify this peculiar area of Pennsylvania law. Prior to 1874 governmental immunity to suit precluded any recovery for "consequential damage" inflicted by governmental agencies.[18] That year, however, the present constitution of the Commonwealth was adopted and in one section provided:

> "*Municipal and other corporations and individuals* invested with the privilege of taking private property for public use shall make just *compensation for property taken, injured or destroyed* by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury or destruction. . ." [19] (emphasis added)

The courts of Pennsylvania have construed this section as imposing liability for "consequential damages" upon the agency responsible therefor. It has been consistently held, however, that this section is inapplicable to the Commonwealth itself, on the ground that the Commonwealth has not been specifically included therein.[20]

Application of this view is illustrated by *McGarrity v. Commonwealth*.[21] In constructing a bridge across the Delaware River it was necessary for the Commonwealth to change the grade of a street running in front of the property leased by the plaintiff's decedent. The new level of the street was six feet below its former gradient and completely denied vehicular access from the property concerned in the suit. The lessee occupying the premises was engaged in a business necessitating the use of trucks and, this street having been his only means of access to the property, was forced to vacate his leasehold and remove his heavy machinery therefrom. The Supreme Court of Pennsylvania affirmed the judgment of the lower court holding that such damage was merely "consequential" and as such did not constitute a "taking" of property

[18] Struthers v. Dunkirk, etc., Ry. Co., 87 Pa. 282 (1878). The basis for this action occurred in 1871.

[19] PA. CONST., art. XVI, § 8.

[20] *In re* State Highway Route, No. 72, 265 Pa. 369, 108 Atl. 820 (1919); Moyer v. Commonwealth, 183 Pa. Super. 333, 132 A.2d 902 (1957); Brewer v. Commonwealth, 345 Pa. 144, 27 A.2d 53 (1942).

[21] 311 Pa. 436, 166 Atl. 42 (1933).

under the Pennsylvania Constitution.[22] The Supreme Court also stated in this case that compensation for such damages was a matter of legislative grace and not of right.

In another and quite similar case the Commonwealth constructed a bridge on an existing street, running generally in an east-west direction. The structure was twenty feet inside the southern line of the street, but resulted in raising the grade line so that access to the complaining property owner's land, situated on the southern side, was impaired. The Supreme Court of Pennsylvania in disallowing compensation stated that no part of the owner's property as such had been taken by the change of grade which was entirely within the street right-of-way, and that any damage to access, light, or air resulting from change of grade was indirect. The Court went on to say, however, that the city or the county in which the bridge was constructed would have been liable had they undertaken the same project.[23]

While the Commonwealth has not been held responsible for "consequential damages," municipal corporations do not enjoy this immunity. In *Walsh v. Scranton* [24] the city of Scranton, in the course of improving a street, had built a retaining wall which cut off access to a connecting street. As a result the plaintiff's property, abutting on the connecting street, was left in a cul de sac. The court held this to be a compensable injury saying:

> "The owner of property which has been depreciated in value by reason of the destruction of the means of access thereto, in the making of a public improvement, sustains an injury in his property rights which is peculiar to himself, and which is different in kind from the injury sustained by those who use the street for travel only; for the impairment of the special right of ingress and egress he is entitled to compensation." [25]

In another case not involving the Commonwealth, the Superior Court of Pennsylvania said, "That a man's right of access to his property is a valuable right which cannot be taken away without just compensation has been repeatedly recognized." [26]

Even under that interpretation excluding the Commonwealth from application of the constitutional provision imposing liability the Commonwealth may be held responsible for "consequential damages", if the act granting

---

[22] PA. CONST., art I, § 10.

[23] Soldiers and Sailors Memorial Bridge, 308 Pa. 487, 162 Atl. 309 (1932); see also Brewer v. Commonwealth, 345 Pa. 144, 27 A.2d 53 (1942).

[24] 23 Pa. Super. 276 (1903).

[25] *Id.* at 278.

[26] Lang v. Smith, 113 Pa. Super. 555, 173 Atl. 827 (1934); see also, Breinig v. Allegheny County, 332 Pa. 474, 2 A.2d 842 (1938); Farmers-Kessinger Market House Co. v. Reading, 410 Pa. 493, 165 Atl. 398 (1933).

authority to undertake the project concerned expressly provides for compensation for "consequential damages" in cases where property is not actually taken.[27]

In a case in which a limited access highway, The Pennsylvania Turnpike, was constructed and large cuts and fills were left exposed with the result that through erosion large quantities of dirt, stones, and debris were washed into a creek and carried into plaintiff's lake, killing his fish, and filling the lake with sludge, the Commonwealth was held responsible and made to compensate the property owner for the "consequential damage." [28] The Supreme Court of Pennsylvania held the Turnpike Commission, an agency of the Commonwealth, liable on the basis that the governmental immunity of the Commonwealth was not applicable in that particular case because the enabling act specifically provided for payment of such damages.[29]

There is a severe limitation on this exception and that is that clear and sufficient "warning" must be indicated in the title of the act under which the Commonwealth is to be held responsible for "consequential damages." [30] This is not to say that the title must be a complete index or synopsis of the contents. The Pennsylvania courts treat an award of "consequential damages" by the Commonwealth as a boon to the fortunate granted by the Legislature rather than the right of all.[31]

It is noteworthy that in passing the Limited Access Highway Law the General Assembly apparently recognized the foregoing injustice. In the latter part of Section 8 appears the following:

> "Provided, however, that the Secretary of Highways shall have authority to enter into agreements for the sharing of the cost of property damages with the officials of any political subdivision of the Commonwealth, which assumes such responsibility by proper resolution or ordinance. The taking of private property and the payment of damage therefor by the authorities of any political subdivision of the Commonwealth shall be in the same manner as now or hereafter provided by law for the relocation or widening of highways by the political subdivision in which such highway is located." [32]

It is clear that political subdivisions may quite properly assume responsibility for "consequential damages." [33] Apparently the Secretary of High-

---

[27] Heil v. Allegheny County, 330 Pa. 449, 199 Atl. 341 (1938).
[28] Ewalt v. Pennsylvania Turnpike Commission, 382 Pa. 529, 115 A.2d 729 (1955).
[29] Western Pennsylvania Turnpike Extension Act, Act of June 11, 1941, P.L. 101, § 6 *(k)*.
[30] PA. CONST., art. III, § 3.
[31] Soldiers and Sailors Memorial Bridge, 308 Pa. 487, 162 Atl. 309 (1932); *In re* State Highway Route No. 72, 265 Pa. 369, 108 Atl. 820 (1919); Hoffer v. Reading Co., 287 Pa. 120, 134 Atl. 415 (1926); McGarrity v. Commonwealth, 311 Pa. 436, 166 Atl. 895 (1933).
[32] Act of May 29, 1945, P.L. 1108, § 8, as amended, Act of June 10, 1947, P.L. 481, § 1; PA. STAT. ANN. tit. 36, § 2391.8.
[33] PA. CONST., art XVI, § 8 (1874).

ways may enter into agreements subjecting the Commonwealth to liability for "consequential damages", but note that the Secretary is not required to enter any agreements.

The problem presented by the Limited Access Highway Law will arise only where a presently existing highway is designated a limited access highway and no land is actually taken. Where a new way is built or the old one relocated or widened, there is necessarily a "taking" which is compensable. Under the present system of measuring damages in eminent domain proceedings in Pennsylvania, subtraction of the "after-value" from the "before-value" with difference equaling the damage, it becomes irrelevant whether or not the way is to be of limited access since that factor can be considered in the determination of the "after-value." [34]

Since the Pennsylvania Courts recognize that an actual seizure is unnecessary to constitute a "taking," and also that an abutting property owner's right of access is itself a property right it would seem only logical for them to recognize deprivation of that right as a "taking" and not to consider it a "consequential damage." As Mr. Justice Maxey, vigorously dissenting in *McGarrity v. Commonwealth,* pointed out, ". . .It is said that a landowner is not entitled to compensation where the damage is merely 'consequential.' The use of the term, 'consequential damage,' 'prolongs the dispute' and 'introduces an equivocation which is fatal to any hope of a clear settlement.' " [35]

Because the Limited Access Highway Law of Pennsylvania does not specifically provide for payment of "consequential damages," it can be fairly assumed that the intent of the Legislature is that none shall be paid thereunder. Counsel for the Commonwealth has so contended in *Creasy v. Stevens.* It seems obvious that the deprivations which would result from enforcement of the Act would be uncompensated "takings" violative of the due process clause of the Fourteenth Amendment.

Another objectionable feature of the Act is the "compromise" proviso in the latter part of Section 8. This, it can be readily observed, could lead to arbitrary and discriminatory awards being made. Political patronage could become one if not the most important factor in deciding who is to be compensated.

---

[34] State Highway Law of Pennsylvania, Act of June 1, 1945, P.L. 1242, art, III, § 303; PA. STAT. ANN. tit. 36, § 670-303. This was apparently the case in Creasy v. Stevens; see statement of the court, 160 F. Supp. at page 408.

[35] 311 Pa. at 452-453, 166 Atl. at 901 (1933) quoting Eaton v. Boston, Concord, and Montreal R.R., 51 N.H. 504, 12 Am. Rep. 147 (1872).

Creasy v. Stevens is, at the time of this writing, on appeal to the Supreme Court of the United States and it remains to be seen whether or not Pennsylvania will find it necessary to re-legislate in the area concerning limited access highways. The expedient method of doing this would be to specifically provide in each enactment, for payment of "consequential damages". This, however, can lead to "spotty coverage" and result in litigation like that in *Creasy v. Stevens.* Further, it seems unlikely that Pennsylvania Courts will quickly change the distinction they presently make between "taking" and "consequential damages." It is suggested that the most permanent remedy would be amendment of the Pennsylvania Constitution placing liability on the Commonwealth for "consequential damages." In view of the growing trend toward limited access highways and the ever increasing value placed on property, this area of the law demands consideration.[36]

THOMAS A. BECKLEY.

[36] For other writings on limited access highway law, see 3 STAN. L. REV. 298 (1951); 43 IOWA L. REV. 258 (1958); 33 ORE. L. REV. 16 (1953); 4 MD. L. REV. 219 (1940); 27 WASH. L. REV. 111 (1952).