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THE PARTIAL TAKING OF PUBLIC UTILITY PROPERTY: AWARDING OF DAMAGES UNDER "UNUSUAL CIRCUMSTANCES"

In *Pennsylvania Gas and Water Co. v. Pennsylvania Turnpike Commission*,¹ the Supreme Court of Pennsylvania held that where land belonging to a public utility, which was necessary for the continued service of the public, was condemned by eminent domain, the measure of damages to be awarded included the replacement or restoration cost of the condemned land. Although this holding was a departure from the normal rules of valuation in condemnation proceedings, the majority felt the unusual circumstances of the case justified the ruling. This Note will examine the currently accepted methods of determining "just compensation"² in the partial taking of public utility lands, and will analyze the reasoning behind cases which award replacement or restoration costs.

Pennsylvania Gas and Water arose following the condemnation of approximately thirteen and one-half acres of land belonging to the Pennsylvania Gas and Water Company, a public utility located in Lackawanna County, Pennsylvania. The condemner, the Pennsylvania Turnpike Commission, acting under the provisions of the Pennsylvania Turnpike Northeastern Extension Act of September 27, 1951,³ took the land for the construction of the Northeast Extension of the Pennsylvania Turnpike. The condemnee claimed the land taken was essential; the land was to be the site of the dam for a reservoir which the condemnee would have to build in the near future, to enable it to fulfill its obligation of providing adequate water for its service area. The condemnee contended the damages awarded should be measured by either the cost of replacing the entire tract of land with a suitable substitute, or by the cost of restoring the present site to its original capacity⁴ by erecting a retaining wall along the portion

1. 428 Pa. 74, 236 A.2d 112 (1967).

2. Just compensation is a nebulous term used by courts with respect to eminent domain which is defined as full indemnity or remuneration for loss or damage sustained by the owner of property taken or injured. *State ex rel. N.W. Electric Power Corp. v. Waggoner*, 319 S.W.2d 930, 934 (Mo. 1959).

3. PA. STAT. ANN. tit. 36 § 660.8(a) (1961). This section states:
The commission is hereby authorized and empowered to condemn, by resolution, any lands, interest in lands, property rights, rights of way, franchises, easements and other property deemed necessary or convenient for the construction and efficient operation of the turnpike. . . .

4. The original capacity of the site was to be a quarter of a billion gallons of water. The owner of the land proposed to prove that as a re-

of land taken.

The condemner, on the other hand, contended that the trial court was correct in not admitting evidence of the cost of a comparable site or the cost of a retaining wall. It argued the proper measure of damages was the difference in value of the whole property before and after the taking.

The Court of Common Pleas of Lackawanna County had awarded the Gas and Water Company seventy-two thousand dollars as "just compensation." This award was based on a ruling that the "highest and best" use of the land was for development for residential and commercial purposes. Evidence of a potential use of the land for reservoir purposes was considered remote and speculative and therefore not admissible. Because of this, the court refused to allow replacement or restoration costs.⁵ The Supreme Court of Pennsylvania reversed, holding that peculiar circumstances existed which justified the replacement or restoration of the land as a reservoir site.

METHODS OF VALUATION IN A PARTIAL TAKING

In legal valuations the courts recognize a close relationship between what property is worth and what the owner of the property would suffer if he were deprived of his land. In the law of damages and of eminent domain, the object of money compensation is to make the owner pecuniarily as near to whole as possible.⁶ The issue presently confronting courts awarding damages to a public utility whose land has been condemned is whether valuation should continue to be based on the traditional methods used on private property. Before discussing which standard should be adopted, it is necessary to define and describe the commonly accepted methods of land valuation.

In awarding damages for the taking of a part of a parcel of land for public use by the power of eminent domain, the courts use one of three methods: (1) the "value plus damages" rule; (2) the "before and after" rule; and (3) the "replacement cost and/or restoration cost" method. The first method awards damages based on the market value of the land taken plus the difference in the market value of the remaining area before and after

sult of the taking any reservoir which could be constructed would be reduced to 8.9 acres (compared to the original 45 acre proposed site) with a capacity of eighteen million gallons of water.

5. Court of Common Pleas of Lackawanna County, No. 469, January Term, 1960. A discussion of the first issue is covered in note 21 *infra*.

6. 1 J. BONBRIGHT, *THE VALUATION OF PROPERTY* 73 (1965).

the taking.⁷ A formulation of this concept is: Value of Land Taken & (Value of Remainder Area Before Taking—Value of Remainder Area After Taking) = Just Compensation.⁸ In utilizing the “value plus damages” rule, the Court of Appeals of Ohio, in *In Re Appropriation of Easement for Highway Purposes*⁹ arrived at three questions to be answered:

(1) What is the fair and reasonable market value of the area sought to be appropriated; (2) What is the fair and reasonable market value of the residue prior to the appropriation; and (3) What will be the fair and reasonable market value of the residue after the appropriation, the difference between the two latter figures reflecting the damages.¹⁰

A similar method of valuation is the second or “before and after” rule by which damages are computed as the difference between the value of the entire tract before the taking and the value of the remaining amount of land of the condemnee after the taking. This is expressed by the formula: Value of Entire Parcel Before Taking – Value of the Remainder Area After Taking = Just Compensation.¹¹

The above two methods are similar and often result in equal awards. Both are based on the concept that the primary considerations are the market value of the tract of land and the loss to the owner as a result of the condemnation of part of the tract. The “value plus damages” rule raises a number of problems which are not present in the “before and after” rule. The first method requires the jury to apportion the value of the whole tract prior to the taking between the value of the part eventually taken and that part not taken. In order to adequately measure the damages, the jury must consider the relationship of the remainder to the original tract.¹² If the jury is not careful in defining the damages to the remainder, the dichotomy between the part taken and the remainder may result in overlapping and the award of double damages. On the other hand, failure to carefully define the resulting damages may result in overlooking some damage, and the withholding of adequate compensation.¹³

Even though the first method has been accepted in the majority of jurisdictions, more recent cases¹⁴ have recognized the

7. *Adirondack Power and Light Corp. v. Evans*, 226 App. Div. 490, 235 N.Y.S. 569 (1929); *Petition of Westinghouse Water Co.*, 388 Pa. 282, 13 A.2d 72 (1940); *Appalachian Elec. Power Co. v. Gorman*, 191 Va. 344, 61 S.E. 33 (1950).

8. 4 NICHOLS, *THE LAW OF EMINENT DOMAIN* 534 (3d Ed. Rev., 1962) [hereinafter cited as NICHOLS].

9. 93 Ohio App. 179, 112 N.E.2d 411 (1952).

10. *Id.* at 180, 112 N.E.2d at 413.

11. 4 NICHOLS, *supra* note 8, at 540.

12. *Id.* at 555.

13. I L. ORGEL, *VALUATION UNDER THE LAW OF EMINENT DOMAIN* 301 (2d ed. 1953).

14. *United States v. 3,065.94 Acres of Land*, 187 F. Supp. 728 (S.D. Cal.

inherent problems in it, and lean toward the usage of the "before and after" rule. For example, the Supreme Court of New York, in a case involving acquisition of private property for the construction of a public water reservoir stated:

If a portion [of the owner's land] only is taken, the owner is entitled to be compensated for the difference between the fair value of the entire property and that of the remainder, after the needed portion has been preempted. . . . In determining the value of the portion not taken, all damages resulting thereto by reason of the use to which the part appropriated is to be put must be taken into consideration.¹⁵

The third method of awarding damages in order to achieve "just compensation" has been developed from situations created when a partial taking involved "unusual circumstances." If the remaining area has been left in a valueless condition, then the award should be the same as upon a complete taking. If, however, the cost of restoring the remainder to its most advantageous use will result in diminishing the amount of damages, the award should be computed using the cost of the necessary repairs as a guideline. This concept results in the following equations:

- (a) Remainder of No Value:
Value of Entire Tract = Just Compensation,
- (b) Remainder Area . . . which may be Rehabilitated:
Value of Part Taken & Cost of Rehabilitation – Value Recovered by Reconstruction = Just Compensation or
Value of Entire Tract = Just Compensation (whichever result is less).¹⁶

An example of this method of valuation is *Chicago v. Callender*,¹⁷ which considered the condemnation of private land and buildings for public use. The Supreme Court of Illinois held:

Where a part, only, of a property is taken, if the jury determines that what remains is worthless, it should award as damages the value of the whole property. . . .

If, on the other hand, the jury determines that the part of the building remaining may be rehabilitated according to some feasible and economical plan shown by the evidence, and that by such rehabilitation the damages can be minimized so that they will be less than . . . if the remaining portion of property be regarded as of no value, they should allow as damages to the portion of property not taken, the

1960); *Pomeroy v. State*, 18 Misc. 2d 377, 191 N.Y.S.2d 84 (Ct. Cl. 1959); *Brown v. Commonwealth*, 399 Pa. 156, 159 A.2d 881 (1960).

15. *Spring Valley Water and Supply Co. v. Haslach*, 24 Misc. 2d 730, 202 N.Y.S.2d 889 (Sup. Ct. 1960).

16. 4 NICHOLS, *supra* note 8, at 542.

17. 396 Ill. 371, 71 N.E.2d 643 (1947).

cost of such rehabilitation less the value recovered by such reconstruction.¹⁸

REQUIREMENTS FOR USAGE OF THE THIRD METHOD

In *Pennsylvania Gas and Water Co. v. Pennsylvania Turnpike Commission*,¹⁹ the issue was whether the third method could be used in measuring the damages to be awarded. As stated previously, the majority recognized that its decision was not along traditional lines, but felt that if the circumstances were uncommon enough, evidence of replacement costs and/or restoration cost must be admitted in order to ensure an equitable result. The dissent, however, maintained that in Pennsylvania the test of damages in awarding "just compensation" has always been and should continue to be, the difference between the market value of the entire property before and after the taking.²⁰ The issue, therefore, lies in a confrontation between the "before and after" method of valuation and the "replacement and/or restoration cost" method.²¹

A case cited by both the majority and dissenting opinions, *McSorely v. Avalon Borough School District*,²² held that evidence of the replacement value of the plaintiff's buildings should not be received, "unless the circumstances were so peculiar as to render it absolutely essential, in the interest of justice, to require its admission."²³ The dissent interpreted *McSorely* as saying that replacement cost has no probative value and is not proper evidence for any purpose. The majority, however, used the ruling in that case to justify the contention that situations exist which are so

18. *Id.* at 374, 71 N.E.2d at 647.

19. 428 Pa. 74, 236 A.2d 112 (1967).

20. *Id.* at 85, 236 A.2d at 119 (dissenting opinion).

21. Prior to ruling on the issue of the proper measure of damages to be used, the court ruled on another question. This was whether the Pennsylvania Gas and Water Company should be allowed to show that the highest and best use of the whole tract of land was as a site for the construction of a reservoir, even though at the time of the condemnation no physical improvements had been made on the property.

The lower court ruled that the use of the property as a reservoir was mere speculation and not provable as the highest and best use. The supreme court, however, held that since the property was naturally suited for use as a reservoir, and because of the need for additional water supplies for the community, the highest and best use was as a reservoir, and the damages should be awarded based on this fact.

In arriving at this decision, the court felt that there are two requirements for proving highest and best use. First, the condemnee must show the physical adaptability of the land to such a use, and second it must demonstrate that this use is needed in the area. If the land in question satisfies these two requirements, then it is not speculative to consider it for the use proposed. The fact that the land is not being used for the highest and best use at the present time does not make it speculative provided there is a need for it to be used in the capacity for which it is naturally suited.

22. 291 Pa. 252, 139 A. 848 (1927).

23. *Id.* at 254, 139 A. at 849.

uncommon as to allow the consideration of replacement and/or restoration value.

To escape valuation by the traditional "value plus damages" and "before and after" methods, a case must fulfill the prerequisites of "unusual and peculiar" circumstances. These are (1) the portion of land taken must belong to a public service corporation; (2) it must be essential to the fulfillment of the public service corporation's duties to the public, and (3) it must be the type of land which does not facilitate itself to valuation by any other method.²⁴

The first requirement was defined in *United States v. Board of Education*.²⁵ There the court considered a determination of the method of valuation when land and buildings belonging to a county were condemned by the government for a flood control project. The government, on appeal, contended that it was not proper for the Board of Education to introduce evidence of the value of property which would have to be acquired if the land taken was to be replaced. In affirming the district court, the court of appeals stated that:

Ordinarily . . . market value is the measure of compensation in condemnation cases; and the difference in market value of the residue before and after taking is ordinarily a fair measure of severance damages. . . . [H]owever, we are not to make a fetish of market value "since it may not be the best measure of value in some cases." Where the highest and best use of the property is for municipal or governmental purposes, as to which no market value properly exists, some other methods of arriving at just compensation must be adopted, and the cost of providing property in substitution for the property taken may reasonably be the basis of the award.²⁶

This ruling demonstrates the first prerequisite necessary for application of the "replacement and/or restoration principle." In awarding just compensation, the courts attempt to insure that the amount awarded is "just" not only to the condemnee, but also to the public, in whose name the condemner acts. To protect the public in eminent domain proceedings, the courts tend to treat public service corporations in a different manner than private property owners. Special treatment is warranted for a number of

24. *United States v. Board of Educ.* 253 F.2d 760 (4th Cir. 1958); *State v. Waco Independent School Dist.*, 364 S.W.2d 263 (Tex. Civ. App. 1963); *Union Free School Dist. No. 8 v. State*, 35 Misc. 2d 373, 230 N.Y.S.2d 416 (Ct. Cl. 1962).

25. 253 F.2d 760 (4th Cir. 1958).

26. *Id.* at 763.

reasons. The primary reason is that the public landowner owes a duty to the general public, either because of a statutory obligation or because of a franchise it has assumed. An example of the special consideration given a public servant is found in the taking, completely or partially, of public school property. Such property, unlike private property, is neither traded nor sold on the open market. The court in *State v. Waco Independent School District*²⁷ addressed itself to these considerations:

[T]he value of what the school has or what it has lost is not the inquiry before us; that inquiry is the cost of restoring the remaining facilities to a utility for school purposes equal to that enjoyed prior to the taking if the facility is reasonably needed to fill a public requirement.²⁸

State v. Waco recognized that a basic difference exists between the obligation assumed by an agency condemning property owned by another public agency, and the obligation it assumes when condemning private property. The court held that:

This distinction lies in the obligation imposed on the condemnee. For example, a private party owes no duty to the public to continue its operation either at its original location or elsewhere. It can move, it can stay, or it can liquidate as it alone sees fit. Not so with a school system charged with a legal obligation to the public. A school system suffering the loss of one of its schools by condemnation must replace that school when the facility is necessary to the education of its children. . . . This is a legally imposed duty on the school district; and it has no other choice.²⁹

The fact that the land to be taken is owned by a municipal corporation or a public utility does not in itself remove the case from the traditional methods of computing damages. The second reason for special treatment of public utility properties is that the public servant, if deprived of land or a facility, will be unable to fulfill its legal commitment to the public.

The New York Court of Claims raised the distinction between land needed for a specific purpose by the utility and land having no special value, in a case involving the taking of part of the land of a school district for highway purposes.³⁰ The court held that for the "substitution theory" to be used, as in *State v. Waco*, the claimant's use of its land prior to the taking must have been so complete that a partial taking would render the entire tract useless. In such a case, for the claimant to adequately fulfill his duties, he must be provided with an entirely new tract.³¹ In the New York case, the portion taken for highway purposes was not in

27. 364 S.W.2d 263 (Tex. Civ. App. 1963).

28. *Id.* at 266.

29. *Id.* at 268.

30. *Union Free School Dist. No. 8 v. State*, 35 Misc. 2d 373, 230 N.Y.S. 2d 416 (Ct. Cl. 1962).

31. *Id.* at 374, 230 N.Y.S.2d at 417.

any manner presently connected to the activities of the school district, nor was the land specifically suited for use as an educational facility to the virtual exclusion of all other land in the area. Plans had been made for eventual use of the land, but these plans did not specifically hinge upon the site in question. They could have been used on any site of comparable size with a minimum of alteration.³²

The second basic element which is necessary for use of the replacement or substitution theory is that the land must be vital to the service which the public utility is required to render to the public. The court must find that if the utility were deprived of the use of the land taken, or a suitable replacement, then it would not be able to function satisfactorily. Courts have not been willing to apply the replacement value concept to the determination of rates a public service corporation is allowed to charge,³³ or to condemnation proceedings in which part of a utility chain is taken by a municipality for its own use and self-management.³⁴ In such instances, courts have refused to depart from the application of either the "value plus damages" method or the "before and after" rule.

The third prerequisite for use of the substitution theory is "that there be no other method to determine the claimant's pecuniary loss."³⁵ As shown in the prior discussion of the two usual methods of determining "just compensation" under eminent domain proceedings,³⁶ the "fair market value" of the land taken and of the remainder is essential to the "value plus damages" and "before and after" rules. If a "fair market value" can be deter-

32. *Id.*

33. *Minnesota Rate Cases*, 230 U.S. 352, 454 (1913). This is a landmark decision dealing with railroads. In ruling whether rates are confiscatory, the court held that

where the inquiry is as to the fair value of the property, in order to determine the reasonableness of the return allowed by the rate-making power, it is not admissible to attribute to the property owned by the carriers a speculative increment of value of similar property owned by others, solely by reason of the fact that it is used in the public service. The land must be vital and also irreplaceable.

34. *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 A. 6 (1902). In this case, the court followed the rule of the ordinary partial-taking cases and refused to consider damages to the remaining area, since the plant taken was physically independent of the other water supply properties owned by the company. Had this not been the case, special damages would have been allowed.

35. *Union Free School Dist. No. 8 v. State*, 35 Misc. 2d 373, 230 N.Y.S. 2d 416, 417 (Ct. Cl. 1962).

36. See discussion on p. 549 *supra*.

mined from the evidence, then there logically exists some other method of evaluating the pecuniary loss of the condemnee.³⁷ In this situation, it has been held that the alternative method should be used instead of the substitution method.³⁸ If the land in question, however, is of such a nature that it has no true "market value,"³⁹ then the property should be valued using the substitution theory.⁴⁰

When a case does not lend itself to valuation by either the "before and after" rule or the "value plus damages" method, the court should investigate the possibility of minimizing the amount of damages to be awarded under the "replacement-restoration" method. This is the only way to insure that the public does not pay an excessive award. The compensation "must be just not only to the person whose property is taken but also to the taker [which generally is the public] who must pay for it."⁴¹ When damage to the remainder of the condemnee's land can be avoided by making repairs, and the cost of repairs will be less than the substitution cost, then these repair costs should properly be the measure of damages awarded.⁴² The condemnee is thus placed in a position where he has a duty to minimize the damages by taking preventative measures which will restore the potentiality of the land for the use of which the condemnee has been deprived.⁴³ The cost of these repairs, if found to be reasonable, may be considered in determining the "just compensation" to which the owner is entitled.⁴⁴

This approach seems to be the most logical in diminishing the loss to both the condemner and condemnee under all three methods of valuation discussed. This practice is followed in cases involving the construction of retaining walls necessitated by road grade changes. For example, a Pennsylvania case⁴⁵ held that

37. If the land can be valued according to the fair market value of the acre units, then this indicates that there is no need to resort to the substitution method as the only equitable means of awarding damages. The courts should only use the replacement-restoration cost method in "unusual circumstances," and land which can equitably be valued using the first or second method does not qualify for this classification.

38. *Union Free School Dist. No. 8 v. State*, 35 Misc. 2d 373, 230 N.Y.S.2d 416, 418 (Ct. Cl. 1962).

39. There are a few exceptional cases in which market value cannot be the legal standard because the property is of such nature and applied to such special use that it cannot have a market value, such as a church, college, cemetery, clubhouse, or terminal of a railroad. *Chicago v. Farwell*, 286 Ill. 415, 121 N.E. 795 (1919). Included in this list is property which is not actually bought and sold on the open market because of the fact that it is specially adapted to the uses to which it is devoted.

40. *United States v. Board of Educ.*, 253 F.2d 760 (4th Cir. 1958).

41. *Garrison v. New York*, 88 U.S. (21 Wall.) 196 (1874).

42. *United States v. Martin*, 267 F.2d 764, 771 (10th Cir. 1959); *Kersey v. Schuylkill River R.R.*, 133 Pa. 234, 19 A. 553 (1890).

43. *Closser v. Washington Co.*, 20 Wash. 90 (C.P. Pa. 1939).

44. 4 NICHOLS, *supra* note 8, at 651.

45. *Greenawalt v. West Newton Borough*, 64 Pa. Super. 576 (1916).

where a town changed the grade of a highway and this change necessitated the readjustment of a driveway, water and gas lines, and the building of a retaining wall to protect steep terraces from erosion, the cost of these repairs was admissible.

The court reasoned that the "cost of preserving property in the condition it was prior to the change of grade, or its restoration thereto, is a proper element to be considered in making an estimate of the market value."⁴⁶ Consideration of the cost of restoring property using a retaining wall was justified by pointing out that there had been no attempt to show the cost of changing the plaintiff's property to a condition which did not exist prior to the grade change.⁴⁷

Thus, the prerequisite which permits inclusion of restoration costs in the determination of "just compensation" is a finding that the condemnee only asks for the return of his remaining property to its most advantageous present use. If he is asking for the cost of repairs which will place him in a better position, physically or pecuniarily, than he maintained prior to the condemnation, then these costs should not be awarded.

A rough measuring device is therefore formed by which courts are able to determine whether eminent domain cases can be valued using the replacement-substitution and/or restoration cost theory. To meet the requirements of this method, a case must involve the taking of land owned by a municipal or public service corporation. This land must also be vital to the continued service the corporation is required to perform for the public. In addition, the land must not have a market value in the traditional sense. If the land in question fulfills these requirements, the court should value the damage done to the condemnee according to the "substitution" method. Once this is done the court must determine whether the cost to the public can be minimized by awarding restoration costs in place of substitution. The formula then is:

Remainder Area . . . which may be Rehabilitated: Value of Part Taken & Cost of Rehabilitation - Value Recovered by Reconstruction = Just Compensation or Value of Entire Tract = Just Compensation (whichever result is less).⁴⁸

APPLICATION OF THIRD METHOD TO PENNSYLVANIA GAS AND WATER

In *Pennsylvania Gas and Water*, the majority believed the factual situation warranted valuation by the third method. They did

46. *Id.* at 579.

47. *Id.* at 579.

48. 4 NICHOLS, *supra* note 8, at 542.

point out, however, that under normal circumstances "fair market value" remained the only available relief.⁴⁹ The case involved the taking of land belonging to a public service corporation by another public servant, the Pennsylvania Turnpike Commission. This in itself did not remove the case from the traditional methods of valuation, but rather it was the nature of the land which provided the justification for measuring the damages differently. This land was purchased for and especially suited for usage as a future reservoir with a specific capacity. Reservoir land does not have a market value in the traditional sense, since by its very nature and the nature of the business of its owner it is not bought and sold or traded on the open market. In addition, if the land was reduced from the original reservoir capacity, the Gas and Water Company would be unable to fulfill its duty to supply the area with an adequate amount of water.

The dissent used two lines of reasoning for not allowing replacement value as damages. First, replacement value has never been and never should be an appropriate test for recoverable damages in eminent domain proceedings, and the measure of just compensation to which an owner is entitled should always be the "before and after" rule.⁵⁰ This approach fails to recognize that valuation under eminent domain is not an exact science. Furthermore, it is contrary to the modern trend which recognizes that situations exist where the compensation would not be "just" unless awarded on a different basis than that used in the traditional case.⁵¹ As previously shown, a number of courts have recognized that where these peculiar circumstances do exist, they merit the application of the substitution and/or restoration cost theory of damages.

The dissent's second reason for not permitting the award to be based on replacement or repair costs was that it would not meet the requirement that compensation be "just" to the condemner as well as the condemnee.⁵² Even if the Gas and Water Company was denied recovery based on replacement value, it could still purchase a substitute site or restore the remainder. The investment necessary to do this could then be recovered in the establishment of the rates it will charge the public.⁵³ This, according to the dissent, is sufficient reason for relieving the Turnpike Com-

49. 428 Pa. 74, 84, 236 A.2d 112, 117 (1967).

50. *Id.* at 85, 236 A.2d at 118.

51. See *United States v. Board of Educ.*, 253 F.2d 760 (4th Cir. 1958); *Clarksville v. United States*, 198 F.2d 238 (4th Cir. 1952); *Mayor v. United States*, 147 F.2d 786 (4th Cir. 1945).

52. 428 Pa. 74, 89, 236 A.2d 112, 120 (dissenting opinion).

53. Justice Eagen reasoned in the dissent that if the Pennsylvania Gas and Water Company bought a substitute site or restored the site to its original capacity, the investment, used in rate-making by the P.U.C. to determine what revenue is reasonable, would be no less because it is traceable to condemnation damages. See *Burgettstown v. West Penn Water Co.*, 29 P.U.C. 410 (1951).

mission of the duty to pay for the damage done by condemnation, as computed by the replacement-restoration theory. This attitude regarding placing the burden of providing the new site is inequitable. The Turnpike Commission is the condemning party. Yet the dissent desires to burden the condemnee with the problem of obtaining a substitute site or restoring the original site to its planned capacity. In either case, the public will eventually be required to pay for the damage done by the taking of the site. It would be more equitable to require the Turnpike Commission to follow the provisions of the statute which creates its powers and defines its responsibilities. In this case, the applicable statute is the Pennsylvania Turnpike Northeastern Extension Act of September 27, 1951.⁵⁴ Section 6(k) of this enabling act provides that:

Adequate compensation shall be made by the Commission out of funds provided under authority of this Act for damages to all public or private property taken, injured or destroyed in carrying out the powers granted by this Act, or such property may be restored or repaired and placed in its original condition as nearly as practicable, as the Commission may deem it expedient in any particular case.⁵⁵

This section of the statute clearly requires the Turnpike Commission to pay adequate compensation for all public property taken or injured. Injury should not mean solely physical injury, but should also include injury done to the condemnee's ability to make the most advantageous use of the property. The Act provides a means for the Commission to decrease the monetary amount it will have to pay by providing that, if it deems it expedient, it can restore and/or place the condemnee's property to its original condition as nearly as possible.

The public will be burdened with the cost of the new site or repairs to the old site no matter which method is used. Had the court decided that the Pennsylvania Gas and Water Company should not be awarded either the replacement or restoration cost, then the public would pay for the substitute or restored site in the form of increased rates. The court's holding that the Pennsylvania Turnpike Commission should pay for the damage according to the replacement-restoration cost method, still requires the public to pay in the form of tolls to cover the expense of the turnpike.⁵⁶

54. PA. STAT. ANN. tit. 36 § 660.8(a) (1961).

55. *Id.* at 36 § 660.6(k).

56. Section 2 of the Act provides that the construction of the turnpike is to be financed through revenue bonds. These bonds are to be retired solely from revenues of the Commission, including tolls, or from such funds as may be available to the Commission for that purpose. In

1964 EMINENT DOMAIN CODE

The decision in *Pennsylvania Gas and Water* was made, without reference to the 1964 Eminent Domain Code now in effect in Pennsylvania.⁵⁷ The reason for this was that the property was condemned prior to the effective date of the statute.⁵⁸

The 1964 Eminent Domain Code provides that the measure or "just compensation" is to be:

[T]he difference between the fair market value of the condemnee's entire property interest immediately before the condemnation and as unaffected thereby and the fair market value of his property interest remaining immediately after such condemnation and as affected thereby, and such other damages as are provided in this article.⁵⁹

This is the "before and after" rule and allows certain additional damages which may result from the taking.⁶⁰ No provision is made for the award of damages according to the "replacement-restoration cost" method. The legislature has deemed it more expedient to consider all condemnation proceedings alike. In view of the decision in *Pennsylvania Gas and Water*, this approach is too restrictive. The statute should be amended to allow for "unusual circumstances." The 1964 Code was promulgated prior to *Pennsylvania Gas and Water* and was unable to reflect the reasoning of the majority in that case. The holding in *Pennsylvania Gas and Water* should be followed in future cases in order to insure "just compensation" to the condemnee, and to keep pace with modern trend in the valuation of eminent domain claims.

CONCLUSION

The ruling in *Pennsylvania Gas and Water* allows juries to hear evidence as to the means of returning a public utility corporation to a position of ability to serve the public. The decision reinforces the rulings cited above which have recognized that situations exist which call for the application of a different method of valuation than those traditionally used. The land of the public service corporation should be included in this area. A public servant has a duty to fulfill, which the owner of private property has not assumed, and it is because of this duty that courts have and must continue to treat public utility property in a different manner than

actuality, then, the cost of paying for the substitute site is paid by the public which uses the turnpike instead of the rate-paying public. This shifts the burden to those who receive the benefit of the condemnation.

57. PA. STAT. ANN. tit. 26 § 1-101 (1968).

58. The effective date of the 1964 Eminent Domain Code was September 1, 1964 and applied only to land condemned after that date. The land taken in *Pennsylvania Gas and Water* was condemned on June 8, 1954.

59. PA. STAT. ANN. tit. 26 § 1-602 (1968).

60. The measure or damages allows for removal expenses (§ 1-608), business "dislocation" damages (§ 1-609), moving expenses (§ 1-610), delay compensation (§ 1-611) and consequential damages (§ 1-612).

private property. This concept is relatively recent and is a major break from the "fair market value" concept of achieving "just compensation." It is a necessary component of the laws of valuation in eminent domain proceedings. If, in the case of the taking of public utility land, the jury decides that the parcel taken is not necessary to the successful fulfillment of the utility's duty to the public, then it should adhere to the traditional rules of valuation. There exists, however, a definite need for a method of compensating the public utility which has necessary land taken that is specially suited for the duty the utility has undertaken to perform. This is where the replacement-restoration cost theory should be utilized. Without this theory of valuation and its application to such situations, forward looking courts will be unable to award "just compensation."

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