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Condemnation Blight and the Abutting Landowner

A class of landowners who often suffer economic loss from land acquisition for government projects is made up of "abutting landowners"—owners of property sufficiently close to property being acquired or under consideration for acquisition by a governmental unit so as to be adversely affected thereby. Virtually every public project has some impact on surrounding property values; the number of abutting landowners affected and the degree of harm they suffer depends on the size, nature, and configuration of the project and surrounding land parcels, and on the speed and public exposure of the government planning process. Economic losses of abutting landowners may fall into one or more of three types. First, in the early planning stages of a government project, the land requirements may be vague or may include land not needed in the final plan.  

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1. The acquisition process generally conforms to the following pattern: First, a government agency initiates a planning study to determine the design and cost of the public project. A final version of the plan, detailing the land to be acquired, is adopted by an appropriate legislative and/or administrative body. Negotiations with landowners who own land in the target area are undertaken, and some owners sell voluntarily. Other owners refuse to sell, and the agency is forced to initiate condemnation proceedings in accordance with applicable statutes. In many jurisdictions, a declaration of intent to "take" must be filed with a court of general jurisdiction to initiate suit against the landowner for the purpose of transferring title and determining compensation. In other jurisdictions, filing by the agency with an appropriate court automatically transfers title in the property to the government. The agency pays the estimated value of the land to the clerk of the court and takes possession of the property. The landowner may either accept the compensation or initiate an action against the governmental unit, claiming a larger amount, or challenge the constitutionality of the taking. See generally 6 P. NICHOLS, THE LAW OF EMINENT DOMAIN §§ 24.11-24.2 (rev. 3d ed. 1972).

2. See, e.g., Foster v. Herley, 491 F.2d 174 (6th Cir. 1974) (urban renewal project reduced value of church property and deprived churches of their congregations); Clinton St. Greater Bethlehem Church v. Detroit, 494 F.2d 185 (6th Cir. 1973) (companion case to Foster); United States v. Honolulu Plantation Co., 182 F.2d 172 (9th Cir.), cert. denied, 340 U.S. 820 (1950) (condemnation of sugar cane plantations reduced sugar refinery's raw material supply); Town of Kure Beach v. United States, 168 Ct. Cl. 97 (1964) (federal condemnation reduced town's tax base); Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1944) (condemnation of surrounding residences and removal of street railway adversely affected rental value of apartment building); N.Y. Times, July 8, 1973, § 8, at 1, col. 4 (late city ed.); id., July 16, 1972, at 61, col. 1 (late city ed.).

3. See, e.g., Sayre v. City of Cleveland, 493 F.2d 66 (6th Cir., cert. denied, 419
Accordingly, a landowner whose land ultimately will not be acquired may suffer an immediate loss in land value, reflecting a perceived loss in the usefulness of his property. Second, as the project progresses and property demands are finalized, the target landowners may abandon or otherwise fail to maintain their property. The subsequent


4. This refrain is repeated in a large number of interviews:

Parcel number 288 was a four-family house that lost all of its tenantry, according to the owner, three years ago when it was announced a highway interchange (Route 75) was going through. The building was vandalized and has since been demolished by the city. The property still has not been taken for the highway yet, there is some question about whether the highway will ever be built. The problems of the parcel left over after land taking has begun can be horrendous.

Parcel number 145 is a small three-story house with a store on the ground floor and two apartments on each of its other floors. The apartments rent at approximately $50 to $55 per month, only $5 more than in 1965. The owner, who formerly operated the fish store on the ground floor, has moved both his business and residence to an adjoining, older suburb. The building was owned by the same individual for more than twenty years. It is in the path of the much anticipated, but now cancelled Route 75. The area around it is aptly described by the owner as "looking like the Gaza Strip." The apartments are very shoddy and need real repair. The owner, however, when asked about making improvements if he was sure of not getting a boost in taxes, pointed out that the building is too old—over eighty years—and besides the highway was going to be built there. For the moment that does not seem to be occurring; the owner isn't sure of the future of the parcel; and there are no potential alternative buyers. One apartment is vacant; the other seems near to going; the store is closed; and the parcel is clearly on the road to abandonment—its future disposal hopelessly caught up in the path of stymied highway construction.

Parcel number 259 is a four-apartment plus two-store frame structure on one of the old shopping streets of the city. Its windows are broken and the building abandoned by tenants, though not boarded up. Vandalized and littered with garbage, it has been standing in the same condition for three years. As far back as 1966 its owner reported it to have been a very poor buy. He bought it in 1963 for $9,000, securing a first mortgage of $5,000 from a savings and loan. The parcel is assessed at $13,300. He reported that he is keeping it because he can't sell it. It is in a distressed area that nobody wants and he is waiting for the city to take the parcel (though it is not in an urban renewal area).

Parcel number 107 is a masonry four-story structure with stores on the bottom floor and six rental units above it. It is now in the hands of the Newark Housing Authority. It was purchased in 1951 for $9,500, with a first mortgage retained by the seller for $5,500. Even then this price compared with a land assessment of $1,800 and a building assessment of $14,800. The owner in the 1964 interview pointed to difficulties in collecting rent and stated that though he wanted to sell the parcel he simply couldn't because of the blighted area "where people don't want to live; up until three years ago the parcel showed 20 to 25 percent return but now there's no return. But I don't want to sell because of the possibilities of takeover by the federal or city authorities." Even in 1965 he could not get insurance except at a very high rate. By 1971 the building was empty; the owner's wait for urban renewal had not paid off. The parcel had been foreclosed by the city.


5. See, e.g., Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich. 1966), affd., 405 F.2d 138 (6th Cir. 1968) (deterioration and abandonment of adjacent properties that were to be condemned along with subject property led to abandonment of
neighborhood deterioration may gradually cause a loss of tenants,6 divert customers,7 and encourage vandalism and other crimes.8 Third, after the government acquires the targeted property, abutting landowners may suffer “proximity damages”—damages resulting from an incompatible use or nonuse of the nearby government property.9

This note will discuss the plight of abutting landowners, and explore various legal theories that may provide them with some recovery against the government units involved. Because most of the theories offer only limited possibilities of recovery, the final section of the note will argue for the creation of a more appropriate remedy.

A landowner aggrieved by governmental acts with respect to neighboring property may seek compensation under two basic theories. First, he may bring a common-law tort action alleging trespass,10 interference with economic relations,11 or nuisance.12 Second, he may

subject property); In re Bunner, 28 Ohio Misc. 165, 276 N.E.2d 677 (Cuyahoga County P. Ct. 1971) (highway project caused deterioration and abandonment of property in target area, leading to abandonment of subject property).

An extensive study of residential abandonment in Newark, New Jersey, found that urban renewal projects contributed significantly to abandonment and improper maintenance by landowners. G. Sternlieb & R. BurcheLL, supra note 4, at 299-301. See also NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 167 (1969).


7. See, e.g., Foster v. Herley, 491 F.2d 174 (6th Cir. 1974) (loss of church congregation); Woodland Mkt. Realty Co. v. City of Cleveland, 426 F.2d 955 (6th Cir. 1970) (loss of food market customers).


Crimes against persons or property in vacant structures can be tied to ease and accessibility for criminal behavior (although the potential economic return on property crimes in vacant parcels dwindles significantly once the structure has been gutted). Thus, generally it may be said that in the case of serious crimes of a premeditated nature, abandoned buildings represent a convenience factor for an individual who has already made a decision to commit a crime. For crimes of spontaneity which thrive despite lack of economic motivation, the abandoned building represents a relatively unobserved shell for criminal activity even though the potential gain is also lessened by the victim's fear and thus avoidance of the neighborhood.

Like crime, fire proliferates in abandoned structures. “Over 10 percent of the city's annual fires now occur in abandoned buildings.” Id. at 171.


10. See text at notes 29-32 infra.
11. See text at notes 33-38 infra.
12. See text at notes 39-65 infra.
seek to prove an unconstitutional taking of his property without compensation. 13

The first barrier to recovery on a tort theory is the government defense of sovereign immunity. 14 While there has been a steady erosion of the doctrine of sovereign immunity by both legislative and judicial action, 15 the doctrine remains viable in some form in federal 16 and most state courts. 17 With respect to claims against the United States, although the Federal Tort Claims Act abrogates the sovereign immunity defense in negligence actions against the federal government, 18 the Act's exception for "discretionary" acts may bar recovery by the abutting landowner seeking compensation for economic damages resulting from a government land-planning decision. 19 Suits for damages resulting from the negligent implementation of the decision, however—for negligent trespass by government-employed workers and for the negligent creation of a nuisance, for example—should be allowed under the Tort Claims Act. 20 The Tucker Act, which provides a forum for claims against the federal government "not sounding in tort," 21 has been held to allow suits alleging an unconstitutional federal appropriation of property, 22 but there is nothing to indicate that it would allow recovery on a tort claim joined with a constitutional claim.

Abutting landowners face similar difficulties with respect to actions

13. See text at notes 66-122 infra.
17. See, e.g., Graham v. Charleston County School Bd., 262 S.C. 314, 204 S.E.2d 384 (1974); Campbell v. City of Knoxville, 505 S.W.2d 710 (Tenn. 1974). See also note 23 infra.
19. The Act provides that the federal government shall not be liable for acts performed within the "discretionary function or duty . . . of a federal agency or an employee." 28 U.S.C. § 2680(a) (1970). This has generally been held to disallow recovery for negligent policy decisions, as opposed to negligent acts. E.g., Dalehite v. United States, 346 U.S. 15 (1953). An abutting landowner will want primarily to contest the scope and creation of a government project, which are policy decisions, rather than the way in which the project is physically implemented. Cf. Woodland Mkt. Realty Co. v. City of Cleveland, 426 F.2d 955 (6th Cir. 1970).
22. E.g., United States v. Causby, 328 U.S. 256 (1945); United States v. Great Falls Mfg. Co., 112 U.S. 645 (1884); United States v. 40.60 Acres of Land, 483 F.2d 927 (9th Cir. 1973) (dictum); Drakes Bay Land Co. v. United States, 424 F.2d 574 (Ct. Cl. 1970).
against states. Most states retain, at least in part, the defense of sovereign immunity for suits against state agencies. Most state courts have also extended sovereign immunity to municipal corporations, the most frequent defendants in suits by abutting landowners. While the extension of immunity protects local governments only in their "governmental" capacities, and not in their "proprietary" roles, an abutting landowner's economic damages typically can be linked only to a "governmental" planning decision. Nuisance and trespass actions, however, can be maintained if they arise out of the project's physical development; in such cases the municipality may be acting in its proprietary capacity. Moreover, some states have entirely abrogated the sovereign immunity doctrine.

Even if the abutting landowner finds a way around the sovereign immunity defense, the individual tort theories themselves impose qualifications on recovery that make them largely inappropriate to remedy fully the abutting landowner's losses. The first tort theory,
a trespass action for the acts of a governmental unit's agents and officers on an abutting landowner's property, offers only a limited damage recovery in specialized fact situations. Although trespass can be either negligent or intentional, it requires an unauthorized intrusion upon the plaintiff's premises, and recovery is limited to those injuries proximately caused by the unlawful entry. Most abutting landowners suffer economic losses that cannot be linked to a governmental intrusion, and such damages as are caused by an errant entry will not normally provide a significant measure of relief. For example, it would be difficult to link tenant evacuation caused by the deterioration of a neighborhood to government employees' occasional entries on the abutting landowner's property.

The second tort theory, interference with reasonable economic expectancies or existing contracts, contemplates interferences that are knowledgeable, intentional, and unprivileged. The theory may prove to be of little help to abutting landowners because governments are usually protected by a general privilege allowing interference with the business relations of a private party when necessary to protect public health and safety. In light of courts' traditional deference to legislative and administrative decisions dealing with the health and safety of citizens, a government act of land acquisition would have to be singularly egregious to allow recovery. For

30. "The trespass may be committed not only by entry upon the land, or by casting objects upon it, but also by causing a third person to enter." W. PROSSER, supra note 14, § 13, at 73. The doctrine also may allow recovery for the entry of invisible gases and microscopic particles. E.g., Martin v. Reynolds Metals Co., 221 Ore. 86, 342 P.2d 790 (1959), cert. denied, 362 U.S. 918 (1960).
31. 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 1.8, at 29 (1956); RESTATEMENT (SECOND) OF TORTS § 162 (1965).
32. See text at notes 3-9 supra. Novel arguments linking losses and intrusions could be tried, however. For instance, it could be urged that the government, by causing neighborhood disruption with its planning policies, caused vandals to injure the plaintiff's property, thereby perpetrating a trespass.
33. See 1 F. HARPER & F. JAMES, supra note 31, §§ 6.5-11; W. PROSSER, supra note 14, §§ 129-30.
35. Imperial Ice Co. v. Rossier, 18 Cal. 2d 33, 112 P.2d 631 (1941) (dictum); RESTATEMENT OF TORTS §§ 768-67, 774 (1959); Carpenter, supra note 34, at 748-49.
37. It probably would be necessary to show that the government's acquisition was solely motivated by a desire to interfere with the plaintiff's contracts and expectancy, cf. Drakes Bay Land Co. v. United States, 424 F.2d 874 (Ct. Cl. 1970), and was not reasonably justifiable as protecting the public welfare. Cf. Deerfield Park Dist. v.
example, if a city acquired property for a landfill adjacent to a landowner's property solely in order to defeat his intentions to subdivide, the landowner might recover for tortious interference. 88

The third tort theory an aggrieved abutting landowner might try is nuisance. Many jurisdictions recognize actions against municipal corporations for the creation or maintenance of a nuisance as an exception to the doctrine of sovereign immunity. Moreover, of all the common-law tort theories, nuisance affords the abutting landowner the broadest basis for potential recovery; the cause of action may arise through intent, negligence, or absolute liability for ultrahazardous activities, and does not require a physical invasion of property. 41

Nuisances fall into two distinct subcategories: Private nuisances interfere with the interests of particular persons in the use or enjoyment of their land, and public nuisances are minor criminal offenses based on some interference with the health, safety, morals, comfort, convenience, or public peace of the general community. A public nuisance may also be privately actionable when, in addition to infringing on public rights, it interferes with the enjoyment of land of and causes special damage to particular landowners. 44

An abutting landowner, whether or not he has suffered “special”


These courts are split on whether a similar exception exists for the licensing of a nuisance. Compare Bagni v. City of Bristol, 127 Conn. 38, 14 A.2d 716 (1940), with Speir v. City of Brooklyn, 159 N.Y. 6, 34 N.E. 727 (1895). It is frequently held that sovereign immunity will bar suits based on a government unit's failure to abate a nuisance created by a third party. See, e.g., Ricketts v. Allegheny County, 409 Pa. 300, 186 A.2d 249 (1962).

The exception to sovereign immunity for municipal corporations for the creation or maintenance of a nuisance does not apply to states or their agencies. See, e.g., Page v. Metropolitan St. Louis Sewer Dist., 377 S.W.2d 548 (Mo. Sup. Ct. 1964); Bingham v. Board of Educ., 118 Utah 582, 223 P.2d 432 (1950). However, state enabling statutes do not authorize municipal corporations to create nuisances. See, e.g., Squaw Island Freight Terminal Co. v. City of Buffalo, 273 N.Y. 119, 7 N.E.2d 10 (1937); Greer v. City of Lennox, 79 S.D. 28, 107 N.W.2d 337 (1961).


41. W. PROSSER, supra note 14, § 87, at 574.

42. See text at notes 55-58 infra.

43. 1 F. HARPER & F. JAMES, supra note 31, § 1.23, at 64-65; W. PROSSER, supra note 14, § 88.

44. See text at notes 50-54 infra.
damages, might convince a prosecuting attorney to prosecute a governmental unit or its officers on a public nuisance theory. Conviction would result in a criminal penalty, typically the imposition of a fine, and might lead the defendant to correct the nuisance. Alternatively, the prosecutor could bring an equitable action for abatement of the nuisance. Failure to comply with the court’s order of abatement would cause the city and its officers to be liable in criminal contempt.

Perhaps for political reasons, criminal prosecutions of governmental units for public nuisances are rare. The abutting landowner has a more effective civil remedy if he can prove that he has suffered special damages—damages distinct from those sustained by other members of the general public—as a result of the public nuisance. Generally, his damages must differ in kind, not only in degree, from those shared by the community. Thus, a plaintiff who suffers an interference with the physical condition of his land typically is held to have suffered special damages, and a municipal corporation has been held liable for creating a “mixed public and private” nuisance when, while building a new prison with prisoner labor, it allowed

45. See, e.g., City of Ludlow v. Commonwealth, 247 Ky. 166, 56 S.W.2d 958 (1933) (city fined for defective sewers constituting public nuisance). The abutting landowner’s attorney, however, should be aware of ABA Code of Professional Responsibility and Canons of Judicial Ethics DR 7-105: “A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.”

46. See, e.g., City of Ludlow v. Commonwealth, 247 Ky. 166, 56 S.W.2d 958 (1933).

47. See, e.g., City of Vernon v. Superior Court, 38 Cal. 2d 599, 241 P.2d 243, modified, 39 Cal. 2d 839, 250 P.2d 241 (1952) (city and officers found guilty of contempt for failing to comply with order to abate pollution of ocean by sewage discharge).

Note, however, that an injunctive remedy may be inappropriate or unavailable against the sort of public project development that often damages abutting property. In most cases, the damage has occurred before the action is brought, and courts would be reluctant to enjoin a partially completed urban renewal or highway project for the sake of a small property owner. In addition, the landowner’s primary interest in most cases will be in obtaining damages, not in restoring the property to its former condition. But cf. Note, Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance, 26 Stan. L. Rev. 1439 (1974), arguing that injunctive relief, rather than damages, is the appropriate remedy against abusive police power regulations.


49. For example, 1933 is the last year a digested case can be found holding a municipality criminally liable for creating a public nuisance.

50. See 1A C. Anteau, supra note 28, § 11.08; 18 E. McQuillen, The Law of Municipal Corporations § 53.49 (1968); W. Prosser, supra note 14, § 89.


several of the prisoners to escape and cross the plaintiff's property.\footnote{53} Similarly, any vandalism damage caused by a government land acquisition project might support a public-nuisance action for special damages.\footnote{54}

If there is substantial interference with the plaintiff's use and enjoyment of his land, the nuisance may be actionable as a private nuisance.\footnote{55} For example, a Minnesota municipal corporation was held to have created a nuisance when its sewage treatment facility polluted a stream crossing the plaintiff's farm.\footnote{56} In deciding a private-(or public-) nuisance controversy, a court must balance several factors—the gravity of the harm, the social utility of the defendant's conduct, the social value of the plaintiff's land use, and both parties' ability to avoid the harm.\footnote{57} The abutting landowner will be disadvantaged in this balancing by the presumption that the legislature is acting in the public interest in undertaking a land development project.\footnote{58}

The major limitation of the nuisance action is that, of the three major categories of damages suffered by abutting landowners—land-value depression because of a loss in future usefulness, the spill-over effects of a deteriorating neighborhood, and proximity damages\footnote{59}—only the third appears to be recoverable in nuisance. The first category of damages is purely economic, and nuisance normally involves a physical act on adjacent property adversely affecting the plaintiff's property.\footnote{60} The second category of damages concerns difficult causation questions because the aggrieved abutting landowner must argue that the condemning authority itself, rather than the third party who owned the adjacent property, allowed it to deteriorate and thus


\footnote{54. Cf. text at notes 103-05 infra.}

\footnote{55. RESTATEMENT OF TORTS § 822 (1939). The interference must be substantial and unreasonable, and offensive to a person of normal sensibilities. Id. A defendant to a private nuisance action may prevail by proving that he is making a reasonable use of his property. See, e.g., Stevens v. Rockport Granite Co., 216 Mass. 486, 104 N.E. 371 (1914); McCarty v. Natural Carbonic Gas Co., 189 N.Y. 40, 81 N.E. 549 (1907).

\footnote{56. Johnson v. City of Fairmont, 188 Minn. 451, 247 N.W. 572 (1933).


\footnote{59. See text at notes 3-9 supra.}

\footnote{60. See, e.g., Edge v. City of Booneville, 226 Miss. 108, 83 S.2d 801 (1955) (noise and odors from a city gas reduction station); Adams v. City of Toledo, 163 Ore. 185, 96 P.2d 1078 (1939) (setting fire to an adjacent building); Milan v. City of Bethlehem, 372 Pa. 898, 94 A.2d 774 (1953) (garbage dump on nearby property).}
adversely affect the plaintiff's property. The recovery of proximity 
damages from an incompatible use of adjacent, government-owned 
property, however, has been common. Proximity damages may result 
from the final planned use of the condemned property or from any 
preliminary condition of the property, and recovery has been 
awarded for damages amounting to less than the full value of the 
plaintiff's property.

If the aggrieved abutting landowner fails in an action based on 
tort, another recourse is a constitutionally based action in inverse 
condemnation. This action is supported by extensive precedent allowing 
recovery against public agencies and is not subject to the defense 
of sovereign immunity. The language of the fifth amendment of the 
United States Constitution—"... nor shall private property be taken 
for public use, without just compensation"—and similar language 
in all but one of the state constitutions have been interpreted to 
require that compensation be paid by government units that "take" 
privately owned property. Accordingly, a landowner can seek recov-

denied, 375 U.S. 845 (1965) (city not liable for nuisance created by subdivision 
developer licensed by city); Ricketts v. Allegheny County, 409 Pa. 300, 186 A.2d 249 
(1962) (city not responsible for county department's creation of nuisance). To the 
extent that the government owns buildings and permits them to deteriorate, some 
losses in this second category may be recoverable as proximity damages. See text at 
ote note 64 infra.

62. See, e.g., Newton v. City of Grundy Center, 246 Iowa 916, 70 N.W.2d 162 
(1955) (sewer polluted creek crossing plaintiff's land); Glace v. Town of Pilot 
Mountain, 265 N.C. 181, 143 S.E.2d 78 (1965) (odors from adjacent sewage treatment plant); 
treatment plant); Squaw Island Freight Terminal Co. v. City of Buffalo, 273 N.Y. 119, 
7 N.E.2d 10 (1937) (sewer pollution).

63. See, e.g., Glace v. Town of Pilot Mountain, 265 N.C. 181, 143 S.E.2d 78 (1965).

64. See, e.g., District of Columbia v. Totten, 5 F.2d 374 (D.C. Cir.), cert. denied, 
269 U.S. 562 (1925) (prisoner escape from building project); City & County of Denver 
v. Talbot, 99 Colo. 178, 61 P.2d 1 (1936) (flooding due to temporary excavation in 
dike).

65. See cases cited note 62 supra. Many jurisdictions do not allow partial recovery 
in inverse condemnation actions. See text at notes 99-100 infra.

66. See 2 P. Nichols, supra note 1, §§ 6.21-6.4.

67. Pumpelly v. Green Bay & Mississippi Canal Co., 80 U.S. (13 Wall.) 166, 177-78 
(1872).

68. E.g., Mich. Const. art. 10, § 2; N.Y. Const. art. 1, § 7; Ohio Const. art. 1, § 19; 
Pa. Const. art. 1, § 10.

Only the North Carolina constitution does not contain any prohibition against 
taking without compensation. That state has reached the same result through 
construction of the state's due process clause. Raleigh & Gaston R.R. v. Davis, 19 N.C. 
431 (1877).

69. See, e.g., Pumpelly v. Green Bay & Mississippi Canal Co., 80 U.S. (13 Wall.) 
166 (1872); Lucas v. Carney, 167 Ohio St. 416, 149 N.E.2d 238 (1958). The fourteenth 
amendment due process clause has been held to apply the fifth amendment taking 
clause to the states and to those to whom the states have delegated their power of 
eminent domain. See, e.g., Madisonville Traction Co. v. Saint Bernard Mining Co., 
ery against a governmental unit in inverse condemnation if the unit refuses voluntarily to acknowledge a de facto taking. A successful inverse condemnation action will enable the aggrieved landowner to recover the lost value of his interest. He may also in some circumstances recover "consequential damages," an ambiguous type of damage that includes severance damages—damages to a piece of remaining land after a part of a tract has been physically appropriated. Consequential damages are typically not awarded, however, where the damage is to a piece of land neighboring, but not actually part of, the tract appropriated or acquired.

The law of inverse condemnation incorporates several legal concepts from tort law. The earliest inverse condemnation decisions employed a physical ouster theory; they required a physical invasion amounting to a total appropriation for government use. The doctrine later was softened to allow recovery for a trespass not amounting to an actual ouster, and then merely for a substantial diminution

The overlap of the federal and state constitutions in this area gives most claimants proceeding against states or state subdivisions a choice of law and forum. See, e.g., Sayre v. City of Cleveland, 493 F.2d 64 (6th Cir.), cert. denied, 419 U.S. 887 (1974) (private plaintiff proceeding against state subdivision in federal court, asserting only federal constitutional claim).


71. E.g., Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922); Eyherabide v. United States, 345 F.2d 565 (Ct. Cl. 1965).

72. Consequential damages typically embrace such indirect and uncompensated losses as good will, business profits, removal expenses, and losses resulting from obstruction to light, air, view and access. Of particular significance is the sharp distinction between consequential damages to a remainder area, where part of a tract is physically appropriated, and consequential damages to a neighboring tract no part of which is actually taken. As to the former, the courts, with surprising unanimity, require the condemnor to pay severance damages, i.e., the depreciation in the fair market value of the remainder area; but as to the latter, most courts deny the adjacent owner recovery despite proof that his property may have been depreciated to an even greater extent. Spies & McCoid, Recovery of Consequential Damages in Eminent Domain, 48 VA. L. REV. 497, 441 (1962) (footnotes omitted).


75. See United States v. Causby, 328 U.S. 256 (1946).
of use, absent a physical invasion—essentially a nuisance theory.\textsuperscript{76} Currently, the test in the federal courts and in many state courts has two branches; it allows recovery for either physical trespass amounting to the taking of an easement\textsuperscript{77} or for a nonphysical interference substantially destroying the land’s usefulness.\textsuperscript{78} Moreover, some of the more recent state court decisions seem to adopt what is in essence an absolute liability theory—proof of any significant damage proximately caused by governmental action is sufficient to allow recovery.\textsuperscript{79}

Even suing in inverse condemnation, however, the abutting landowner faces several difficult hurdles. First, the “substantial interference” branch of the inverse condemnation action has been held to require a near total destruction of the property’s usefulness.\textsuperscript{80} Furthermore, while some courts have applied this test to abutting landowners,\textsuperscript{81} two lines of cases have required more, virtually foreclosing

\textsuperscript{76} Stoebuck, supra note 74, at 400.


A number of courts deny inverse condemnation recovery if there is no physical invasion and the government’s acts would not support a negligence or nuisance action against a private individual. See, e.g., City of Louisville v. Munro, 475 S.W.2d 479 (Ky. App. 1971) (city zoo); Aguayo v. Village of Chama, 79 N.M.2d 729, 494 P.2d 331 (1969) (sewage treatment plant); Gervasi v. Board of Commrs., 45 Misc. 2d 341, 256 N.Y.S.2d 910 (Sup. Ct. 1965) (water tower). Cf. City of Houston v. Renault, Inc., 431 S.W.2d 322 (Tex. 1968) (flooding not actionable absent negligence or nuisance).

\textsuperscript{80} See Albers v. County of Los Angeles, 62 Cal. 2d 220, 386 P.2d 129, 42 Cal. Rptr. 89 (1965); Thomas v. State, 196 Ore. 120, 246 P.2d 703 (1952); Mandelker, Inverse Condemnation: The Constitutional Limits of Public Responsibility, 1966 Wis. L. Rev. 3, 32-33.

inverse condemnation recoveries based only on interference with land usefulness.

In *Sayre v. City of Cleveland*, the plaintiff alleged that the city's designation of a General Neighborhood Renewal Plan Area that included his properties, and the city council's passage of a preliminary resolution of intent to appropriate some of his properties, had destroyed the income from his rental properties, substantially reduced their market value, and caused the bankruptcy of his rental business. The city's affidavit indicated that none of the properties involved had ever been finally designated for appropriation, nor had any been the subject of an eminent domain proceeding. The court held that summary judgment should be granted in favor of the city: “[W]e think the true rule is that there is no de facto taking of properties which have decreased in value because of an urban renewal project unless there is physical invasion, damage or injury, or a restraint of some type, or action by the City to appropriate such properties.”

In so holding, the *Sayre* court severely limited the traditional theory of substantial interference as evidence of a taking; in effect, the court reinstated the old version of the inverse condemnation test that limited taking to government trespasses, in so far as abutting landowners are concerned.

The second line of limiting cases is best illustrated by *Conroy-Prugh Glass Co. v. Commonwealth*. Advance publicity and public hearings indicated that a street extension would run through the plaintiff's property. The plaintiff alleged that the publicity caused his tenants to vacate and destroyed the marketability of his property, and thus amounted to a de facto taking. The court held that he could not recover:

> It is generally recognized that the mere plotting or planning in anticipation of a public improvement does not constitute a “taking” or compensable injury to the property affected. . . . Absent physical in-

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83. The General Neighborhood Renewal Plan was a general preliminary plan, prepared to satisfy statutory requirements for federal funding. It did not designate specific properties to be acquired; this was done in the later and more specific Urban Renewal Plan, which included none of the 87 properties involved in the appeal. 493 F.2d at 67-68.

84. With one possible exception, which the court felt was not significant, no official notice had been given of intent to appropriate any of the properties. 493 F.2d at 68.

85. 493 F.2d at 70.

86. See text at notes 74-75 supra.


88. 7 Pa. Comm. at 67-68, 298 A.2d at 673.
Trusion upon or physical damages to property a de facto “taking” occurs or compensable injury is sustained only in those cases where the governmental body by its affirmative action or course of conduct directly interferes with one’s use and enjoyment of his property and the injury complained of is the direct consequence of such action or course of conduct.89

The court apparently concluded that advance publicity and anticipatory planning were not “affirmative acts” that could justify recovery in inverse condemnation under the substantial interference test.90 The test is broader than the one used in Sayre in that it may allow for recovery in the absence of direct government appropriation proceedings. However, the Pennsylvania court’s narrow definition of “affirmative act” will exclude some cases of substantial value diminution caused by publicized government planning activity.

These decisions illustrate the refusal of courts to extend to abutting landowners the principles used to compensate condemnees for “condemnation blight.” “Condemnation blight” refers to the depression in market value of a parcel of real estate that occurs between the time it becomes known that the land is being considered for acquisition by a governmental unit and the statutory or judicially established date of valuation for governmental compensation for the actual taking.91 The landowner, during this often lengthy time pe-

89. 7 Pa. Comm. at 70-71, 298 A.2d at 674.

90. But cf. Philadelphia Parkway, 250 Pa. 257, 95 A. 429 (1915); In re Crosstown Expressway, 3 Pa. Comm. 1, 281 A.2d 909 (1971) (unequivocal expression of intent to appropriate property could be “taking” or “injury” under state constitution and statutes). Crosstown Expressway was distinguished in Conroy-Prugh on the ground that condemnation proceedings in the former case actually had been initiated against some neighboring properties. The project was thus active at the time the inverse condemnation action was brought. 7 Pa. Comm. at 69-70, 298 A.2d at 674.

“Preliminary proceedings” stopping short of a completed condemnation have been held by several other courts not to effect a taking. See, e.g., Chicago Housing Authority v. Lamar, 21 Ill. 2d 822, 172 N.E.2d 790 (1961); Empire Constr., Inc. v. City of Tulsa, 512 P.2d 119 (Okla., 1973); Thow v. City of Dallas, 499 S.W.2d 347 (Tcst. Civ. App. 1973). Cases are collected in Annot., 37 A.L.R.3d 127 (1971).

A number of courts have held that designation of a property as within an urban renewal area is not a taking, even though its value may be depressed thereby. See, e.g., Adams v. Sims, 238 Ark. 696, 385 S.W.2d 13 (1965); Cayon v. City of Chicopee, Mass. --, 277 N.E.2d 116 (1971); Sorbino v. City of New Brunswick, 43 N.J. Super. 554, 129 A.2d 473 (1957); 76 Crown St. Corp. v. City of New York, 35 App. Div. 2d 1005, 317 N.Y.S.2d 978 (1970).


Typically, courts and commentators have been concerned with condemnation blight as it affects “direct line” property that is slated to be acquired by a governmental unit—rather than with abutting property. See, e.g., Adams, Eminent Domain,
period, may suffer considerable losses. The losses typically are the same as those suffered by abutting landowners: a depression in market value occurring immediately after the public project is publicized, due to the limited future usefulness of the property, and the more gradual loss of income that accompanies the deterioration of the condemnees' neighborhood. Although some courts continue to deny recovery for condemnation blight, several courts have been more liberal, either measuring the value of the property taken as of a date


If condemnation proceedings are formally initiated and then discontinued, the property owner may be able to recover his expenses and other damages from the governmental unit. See generally Note, Discontinuance in Condemnation Proceedings: A Study of the Conceptual Approach, 21 U. Pitt. L. Rev. 647 (1960); Note, The Condemnor's Liability for Damages Arising Through Instituting, Litigating, or Abandoning Eminent Domain Proceedings, 1977 Utah L. Rev. 543. Cases are collected in Annot., 92 A.L.R.2d 355 (1963).


94. See, e.g., City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 249, 269 N.E.2d 895, 900, 321 N.Y.S.2d 345, 352 (1971) ("by reason of the threat of condemnation property values were drastically reduced").

95. See text at notes 5-8 supra.

96. The most conservative judicial response is that a compensable taking does not occur until the date that all statutory requirements for condemnation have been satisfied; the land is valued only as of that date. See, e.g., Chicago Housing Authority v. Lamar, 21 Ill. 2d 362, 172 N.E.2d 790 (1951); Land Clearance for Redevelopment Authority v. Morrison, 457 S.W.2d 188 (Mo. 1970), noted in Note, 40 U. Mo. Kan. City L. Rev. 97, supra note 91.
prior to the price depression caused by the condemnation or holding that a de facto taking occurs when the government project unreasonably depresses property value before the official valuation date. In spite of these liberal holdings, which in effect compensate property owners whose land eventually is condemned for partial diminutions in land value and income, no recovery has been allowed abutting landowners for partial losses of land market value or income potential caused by the condemnation of adjacent land.

The other branch of the inverse condemnation test—compensating for physical intrusion or damage by government instrumentalities—may allow recovery for the abutting landowner in certain circumstances. For example, repeated trespasses by government agents or instrumentalities might support recovery of direct and consequential damages on this theory. Similarly, there might be recovery if the government land acquisition project causes a marked increase in local vandalism, and vandals enter upon and injure the


98. In some direct condemnation actions, the landowner has succeeded in showing a de facto taking at a date earlier than the statutory taking, giving him both an earlier date of valuation and compensation for interim expenses and lost income. See, e.g., In re Urban Renewal, Elmwood Park Project, 576 Mich. 311, 136 N.W.2d 890 (1968); Bekos v. Masheter, 15 Ohio St. 2d 15, 15 Ohio St. 2d 15, 233 N.E.2d 548 (1965); Luber v. Milwaukee County, 47 Wis. 2d 251, 177 N.W.2d 380 (1970). In other cases, the landowner has initiated a separate inverse condemnation action to recover for the de facto taking. See, e.g., Foster v. City of Detroit, 405 F.2d 138 (6th Cir. 1968); Drakes Bay Land Co. v. United States, 242 F.2d 574 (Ct. Cl. 1970); In re Crosstown Expressway, 3 Pa. Comm. 1, 281 A.2d 999 (1971).

Some courts have refused to find a de facto taking absent some direct physical or legal restraint on property use. See, e.g., Sayre v. City of Cleveland, 493 F.2d 64 (6th Cir.), cert. denied, 419 U.S. 877 (1974); City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 211, 296 N.E.2d 860, 321 N.Y.S.2d 450 (1971).

99. See, e.g., Delaware River Joint Toll Bridge Commn. v. Colburn, 310 U.S. 419 (1940) (bridge pier on adjacent land blocked access); Transportation Co. v. City of Chicago, 99 U.S. 635 (1876) (tunnel construction caused removal of lateral support and river access); Bache v. Board of Control, 23 Cal. 2d 345, 144 P.2d 818 (1943) (restriction of access by bridge project and removal of street railway); Cuneo v. City of Chicago, 222 Ill. App. 235, 11 N.E.2d 16 (1937) (condemnation of nearby market); Richert v. Board of Educ., 177 Kan. 502, 280 P.2d 596 (1955) (other lots on residential block condemned for school).


101. See text at note 77 supra.

102. See, e.g., United States v. Causby, 328 U.S. 256 (1946); Portsmouth Harbor Land & Hotel Co. v. United States, 269 U.S. 327 (1922); Eyherabide v. United States, 345 F.2d 565 (Ct. Cl. 1965).
plaintiff's land. The injury is somewhat analogous to unauthorized entry and damage by flooding water or sliding mud. In cases allowing recovery for flooding and mud slides, the government had induced the invasion by altering the natural slope of the land or by blocking the natural drainage; similarly, the government may cause vandalism by removing a property's natural protection—a stable neighborhood.

Most state constitutions when originally adopted followed the Federal Constitution, and included only the proscription that "private property shall [not] be taken for public use, without just compensation," or other similar language. However, beginning in the last half of the nineteenth century, many states amended their constitutions or adopted new ones, providing compensation for property "... taken or damaged for public use...", or including language to the same effect. State courts have taken both strict and liberal views under both sorts of constitutional language. Courts adopting

103. Cf. Foster v. City of Detroit, 405 F.2d 138 (6th Cir. 1968); Bekos v. Masheter, 15 Ohio St. 2d 15, 238 N.E.2d 548 (1965). In both of these cases, claimants' buildings were vacated, vandalized, and demolished by city order as public nuisances before actually being condemned.


106. See text at notes 68-69 supra.


108. For example, in Illinois, the first state to adopt the new and presumably more liberal language, see City of Chicago v. Taylor, 125 U.S. 161 (1888) (granting recovery under Illinois constitution against city for cutting off street access), the decisions have been remarkably adverse to landowners. See, e.g., Chicago Housing Authority v. Lamar, 21 Ill. 2d 362, 172 N.E.2d 790 (1961) (denying compensation to condemnee for precondemnation blight); City of Chicago v. Loitz, II Ill. App. 3d 42, 295 N.E.2d 478 (1973) (no compensation for business losses due to threatened condemnation); Cuneo v. City of Chicago, 292 Ill. App. 235, 11 N.E.3d 16 (1973) (no recovery for business losses due to condemnation of nearby land).

strict interpretations of their constitutions apply the federal test—a claimant can recover only if there has been a physical invasion of his property or if its value has been substantially destroyed.\(^{110}\) The more liberal view allows recovery for a pro tanto taking upon proof of special damages—damages uniquely affecting the property involved—even though there is no physical invasion and a limited use for the property survives.\(^{111}\) The classification of injuries as special or general is not uniform among the states, however, and involves two questions: (1) How serious must the damage to the property be in order to be “special”?\(^{112}\) (2) What “community” is the reference for determining whether the damage is unique?\(^{113}\) There are no clear answers to these questions: courts in answering them tend more to state conclusions than to develop working theories of classification.\(^{114}\) Nevertheless, most courts require the damage to the property to be unique and unusually direct or severe. Some courts require physical damage,\(^{115}\)

While some courts in jurisdictions with language in their state constitutions that refers only to property “taken” have been generous to landowners suffering proximity damages, e.g., City of Jacksonville v. Schumann, 167 S.2d 95 (Fla. Dist. Ct. App. 1964), other courts have held the lack of “or damaged” language to require a conservative approach:

Public improvements often cause severe incidental damages for which, under this rule, no compensation may be obtained. But it must be remembered, as has been pointed out in other cases, that despite the examples of constitutional amendments and statutes enacted in other jurisdictions to provide the compensation, none have been enacted in this state; and the fact imposes on the courts all the more firmly the duty of observing the limits of the constitutional prohibition. It is not their part to provide otherwise.


110. See text at notes 77-78 supra. See, e.g., Weir v. Palm Beach County, 85 S.2d 865 (Fla. 1956) (deprivation of access must be total to warrant compensation); State ex rel. Fejes v. City of Akron, 5 Ohio St. 2d 47, 213 N.E.2d 353 (1965) (physical damage from adjacent highway construction did not invade or interfere with ownership); McKee v. City of Akron, 176 Ohio St. 282, 199 N.E.2d 592 (1964) (odors from sewage treatment plant not a taking).

111. See, e.g., Thomsen v. State, 284 Minn. 468, 170 N.W.2d 575 (1969) (highway right-of-way narrowed adjacent to plaintiff’s land; highway noise and lights may be items of special damage); City of Abilene v. Bailey, 342 S.W.2d 540 (Tex. Civ. App. 1961) (odor from sewage plant).

112. Compare Thomsen v. State, 284 Minn. 468, 170 N.W.2d 575 (1969) (highway noise and lights may be items of special damage), with Arkansas State Highway Commn. v. McNeill, 238 Ark. 244, 245-46, 381 S.W.2d 429, 429 (1964) (noise from highway equals general damage).

113. Compare Town of Hempstead v. Village of Rockville Center, 67 Misc. 2d 123, 329 N.Y.S.2d 872 (Sup. Ct. 1971) (damage to property values by water tower was common to community), with McKinney v. City of High Point, 237 N.C. 66, 74 S.E.2d 440 (1953) (erection of water tower across street stated cause of action for taking), and City of Abilene v. Bailey, 345 S.W.2d 540 (Tex. Civ. App. 1961) (odor from sewage plant was “special” even though other properties were similarly affected).

114. See 4A P. Nichols, supra note 1, § 14.1, at 14.5.

115. See, e.g., Richmond County v. Williams, 109 Ga. App. 670, 177 S.E.2d 945 (1964) (physical damage to home from construction of highway); Ewema Co. v.
although many do not.\textsuperscript{116} Only one state court has interpreted the “special damage” requirement to encompass any significant reduction in the value of the relevant property.\textsuperscript{117}

In sum, although an inverse condemnation action is not susceptible to a sovereign immunity defense, and is well supported by precedent, under the Federal Constitution and many state constitutions the abutting landowner may use it to recover his economic damages only if his property’s usefulness has been substantially destroyed by governmental acts.\textsuperscript{118} Although physical intrusions may also support recovery,\textsuperscript{119} such intrusions typically do not cause a major part of an abutting landowner’s losses.\textsuperscript{120} Some relaxation of the inverse condemnation test is taking place in some state courts,\textsuperscript{121} but only one court has granted recovery merely on the basis of a diminution in market value.\textsuperscript{122}

The alternatives outlined above fall significantly short of providing recovery for many aggrieved abutting landowners. For example, an abutting landowner who suffers a fifty per cent loss of income from his rental property over a period of several years due to uncertainty regarding the land needs of an urban renewal project would not be afforded relief under any of the existing theories if his property was never actually appropriated. Similarly, he could not recover for a fifty per cent loss of market value linked to the neighborhood deterioration caused by abandoning condemnees and other abutting landowners. Yet, the basic policy of the fifth amendment seems violated when significant economic burdens are imposed on abutting landowners by the blighting effects of public projects. It is not consistent to award compensation to condemnees for partial precondemnation losses while denying all recovery to abutting landowners for similar partial losses of property income or value. The Supreme Court has often stated that “[t]he word ‘just’ in the Fifth Amendment evokes ideas of ‘fairness’ and ‘equity,’”\textsuperscript{123} but imposing heavy losses on abut-

\textsuperscript{116} See, e.g., Thomsen v. State, 284 Minn. 468, 170 N.W.2d 575 (1969) (highway light and noise).

\textsuperscript{117} City of Abilene v. Bailey, 345 S.W.2d 540 (Tex. Civ. App. 1961) (odor from sewage plant was “special” even though other properties were similarly affected).

\textsuperscript{118} See text at notes 78, 99-100 supra.

\textsuperscript{119} See text at note 77 supra.

\textsuperscript{120} The major part of the abutting landowners’ losses are economic rather than physical. E.g., Sayre v. City of Cleveland, 49 F.2d 64 (6th Cir.), cert. denied, 419 U.S. 837 (1974) (loss of tenants); Woodland Mkt. Realty Co. v. City of Cleveland, 426 F.2d 955 (6th Cir. 1970) (loss of customers); Drakes Bay Land Co. v. United States, 424 F.2d 574 (Ct. Cl. 1970) (loss of property value).

\textsuperscript{121} See text at notes 107-17 supra.


ting landowners so as to benefit the general public inequitably distributes the cost of the project among the citizenry. The community benefits from the planning and creation of public projects; the community, through its government, should therefore assume the burden of payment.

Two policy arguments frequently are made to support a denial of compensation to parties adversely affected by government decisions. One points to the problem of economic feasibility and administrative convenience. As one court stated:

While not unmindful of the consequences that may possibly be visited upon property and property values by reason of planning by governmental bodies, particularly in those cases where voluntarily—or as required by law—publicity is given to a public improvement project and public hearings are conducted incident thereto, we do not believe that these consequences as a matter of law are within the concept of a de facto “taking” . . . . To hold otherwise in this class of cases would expose governmental bodies to liability for damages for all adverse consequences to property and property values, no matter how remote, associated with the planning of public improvement projects. 124

Administrative convenience should not justify a denial of compensation with respect to those landowners whose property suffers a severe economic devaluation, even if the property remains useful in limited respects. The fear of exposing governmental bodies to claims for “remote” damages ignores the fact that an abutting landowner must prove his damages, and must prove that a government act caused his damages, to justify recovery.

The second argument for denying compensation is that the development of a public project is basically a political decision, to be made by a political body. 126 Accordingly, the question of who must bear the ultimate economic cost of a public project is properly determined by the legislative body involved. 128 This argument begs the question, however, for it ignores the role of the federal and state constitutions in curbing legislative excesses. It is true that governmental units must have broad discretion to allocate social benefits and burdens, but the allocations must be made within the framework of individual liberties and constraints against arbitrary state actions that the federal and state constitutions provide. Allowing political bodies to determine absolutely who may and who may not recover in inverse con-

126. See, e.g., Woodland Mkt. Realty Co. v. City of Cleveland, 426 F.2d 955, 958 (6th Cir. 1970).
demnation would seem to violate the spirit and purpose of the fifth amendment and similar state constitutional provisions.\textsuperscript{127}

While the state and federal supreme courts are the final arbiters of the construction that must be given to the “taking” clauses of their respective constitutions,\textsuperscript{128} their interpretations establish only minimum standards for compensation to landowners for losses caused by governmental activity.\textsuperscript{129} Since most of the current tests seem to be unjustifiably harsh with respect to abutting landowners, a legislative solution seems necessary and desirable. Besides providing for additional compensation for abutting landowners, legislation could establish administrative procedures for landowner complaints. Several jurisdictions, for example, employ administrative agencies to aid in determining compensation claims arising out of some direct and inverse condemnation actions.\textsuperscript{130} Such schemes, perhaps requiring an initial petition to a special administrative body with the power to award compensation, followed by judicial review, would make use of personnel who are specialists in land use and value.

A second advantage of a statutory solution would be that the legislature could define specific guidelines for compensation, based on its policy evaluations.\textsuperscript{131} For instance, the legislature could prescribe full compensation for economic injury caused by public projects where the permanent loss exceeds a stated percentage of the market value.

\begin{itemize}
\item 127. See Luber v. Milwaukee County, 47 Wis. 2d 271, 177 N.W.2d 390 (1970) (statute intended to broaden recovery for precondemnation loss of income held unconstitutional under state constitution as it allowed recovery only for losses for year preceding appropriation).
\item 128. See, e.g., Pumpelly v. Green Bay & Mississippi Canal Co., 80 U.S. (13 Wall.) 166 (1872); Thornburg v. Port of Portland, 283 Ore. 178, 376 P.2d 100 (1962).
\item 129. Some states have broadened inverse condemnation rights by statute. See, e.g., CAL. GOV'T CODE §§ 7265-7265.3 (West Supp. 1974); PA. STAT. ANN. tit. 26, §§ 1-502(c), 1-601 to -606A (Supp. 1974); WIS. STAT. ANN. §§ 32.09-10 (1975).
\item 130. For instance, in California all direct and inverse condemnation actions involving the state must first proceed through an administrative body, the State Board of Control. Appeal lies in the courts. CAL. GOV'T CODE § 945.4 (West 1966). See, e.g., Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943).
\end{itemize}
of the property, or where income loss exceeds a percentage of average income over a base period. A set of rebuttable presumptions, based, for example, on distance from and nature of the project, could be established to measure a landowner's loss.132

Government liability to abutting landowners, whether the product of statute or case law, might be a step toward the streamlining of project planning and execution. Government land acquisition projects now are often caught up in bureaucratic snarls and costly delay, with resulting harm to abutting landowners.133 Perhaps it is not foolish to speculate that at least part of these difficulties are attributable to the lack of responsibility of those who cause the problems to those who suffer thereby.

133. See, e.g., note 4 supra.