

Road to Confusion

The rule for taking private property faces some novel twists and turns

BY STEPHEN I. ADLER

Like most legal standards, the rule that private property owners must be compensated for the taking of their property is conceptually simple. Only when courts apply the rule to real situations does it become complicated.

Recent rulings by supreme courts in Minnesota and Texas illustrate the increased complexities that could be in store for the takings rule.

The essence of the takings rule is stated in the Fifth Amendment to the U.S. Constitution, which directs that private property shall not "be taken for public use, without just compensation."

State and federal courts have interpreted the takings clause to mean that property owners should be made whole for the loss of their property.

One of the most common takings scenarios involves the widening of an at-grade roadway and its conversion to a controlled-access, raised freeway. The state often finds that it must take land—usually only frontage—from land abutting the old highway.

Simply stated, before the construction of the new elevated freeway, the landowner enjoyed all the freedom of access, visibility and traffic count characteristic of a property abutting an at-grade roadway. After the project's completion, however, most properties lose those features.

In addition, the remainder is subjected to years of construction interfering with its access and visibility. As a result, most remainder properties undergo a substantial

Stephen I. Adler is a partner at Barron & Adler in Austin, Texas. He is a member of the Condemnation Committee of the ABA Section of Real Property, Probate and Trust Law.

decrease in their market values.

In recent years, a number of courts have answered affirmatively the question, as stated by the Minnesota Supreme Court in *State v. Strom*, 493 N.W.2d 554 (1992), of "[w]hether evidence of construction-related interferences and loss of visibility may be taken into account to the extent they affect the market value of the property in de-

crease in their market values. since a purchaser might pay less if he knew such injuries were to be inflicted."

But a year ago, the Texas Supreme Court held in *State v. Schmidt*, 867 S.W.2d 769, that a landowner is not necessarily to be made whole and is not entitled to damages taking into account all marketplace factors.

(The U.S. Supreme Court denied a petition for certiorari on June 27.)

The court held that damages occurring off the "taken" part of the property are generally not recoverable, since they do not arise from that property's use.

But the court added that a landowner could recover damages flowing from the entire construction project if three elements exist:

The land taken from the condemnee landowner is indispensable to the project; the land taken constitutes a substantial part of the tract devoted to the project; and the damages resulting to the remainder from the use of the land taken are inseparable from the condemnor

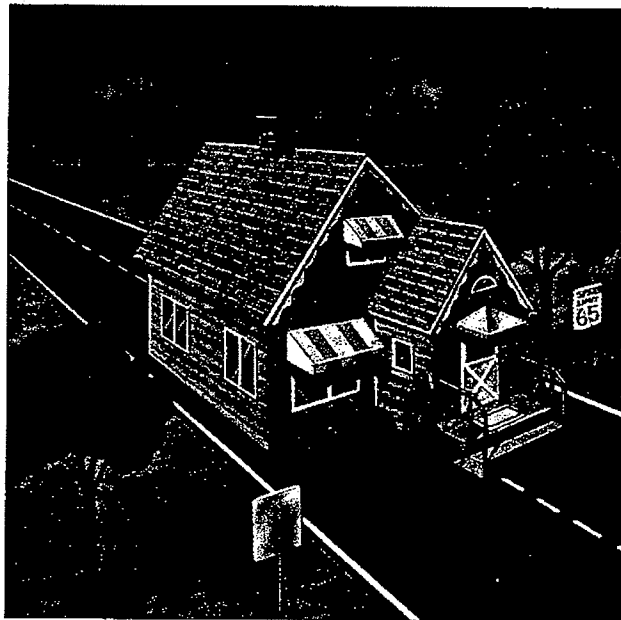
government's use of adjoining land in the project.

Questions of Vagueness

This new, three-part test raises many questions about its application, particularly because the key terms in the test—"indispensable," "substantial" and "inseparable"—are inherently vague.

The court was similarly vague on the question of whether landowner damages were "community" in nature. (Texas, like most jurisdictions, statutorily eliminates from a landowner's compensation "injury or benefit that the property owner experiences in common with the general community.")

In Texas, at least, the already complicated area of takings law is becoming even more convoluted. Whether the pattern spreads to other states remains to be seen. ■



terminating just compensation in an eminent domain proceeding."

Pointing out that Minnesota follows the widely accepted "before and after" market value rule in measuring just compensation for a partial taking, the court explained, "The measure of damages is the difference between the fair market value of the entire piece of property immediately before the taking and the fair market value of the remainder property after the taking."

In assessing market value, the court followed the general rule that any matter may be considered that would influence a prospective buyer and seller in fixing the price of the property.

In particular, the court held that "the mere fact that injuries will be temporary and incident to the period of construction only is no ground for disallowing a recovery,