ACCESS LOSS DISTINGUISHED FROM TRAFFIC FLOW DIVERSION

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When the Supreme Court of Arizona reversed the *Forsstrom*[1] and *Grande*[2] cases, its sword was directed against damages to access easements, not traffic flow. The easement of access is worth less to most roadside property than the public incident of traffic. It is this incident that causes roadside property to be valuable, and causes the greatest diminution of value when re-routing of traffic is involved.

In a recent Arizona case, *State ex rel. Morrison v. Thelberg*,[3] the loss in value to the remaining parcel may be said to be twenty per cent of total damages, while loss of traffic incident is eighty per cent of total diminution of value. All this was allowed to be charged off as access loss. The Arizona Supreme Court upon the rehearing[4] said in part:

> . . . the sole question presented by this appeal is: Does an abutting property owner's right of access to a public highway entitle him to compensation for severance damages where part of his land is taken in order to convert a conventional highway into a controlled-access highway so that *access* to and from his remaining property is controlled by a frontage road. (emphasis mine)
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> When the controlled access highway is constructed upon the right of way of the conventional highway and the owner's ingress and egress to abutting property has been destroyed or substantially impaired, he may recover damages therefor. The damages may be nominal or severe. Other means of access such as frontage roads as in the instant case may be taken into consideration in determining the amount which would be just under the circumstances. . . . Other means of access may mitigate damages . . . but does not constitute a defense to the action. . . .[5]

This language should not be regarded as confined to controlled access highways. It means that if access is substantially impaired, even by the exercise of the police power, the owner may collect compensation in ratio to the diminution of market value of abutting property directly attributable to loss of the easement.

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* See Contributors' Section, p. 87, for biographical data.

[1] *In re* Forsstrom, 44 Ariz. 472, 38 P.2d 878 (1934).

[2] Grande v. Casson, 50 Ariz. 347, 72 P.2d 676 (1937).

[3] 86 Ariz. 263, 344 P.2d 1015 (1959).

[4] State *ex rel* Morrison v. Thelberg, 87 Ariz. 318, 350 P.2d 988 (1960).

[5] *Id.* at 323, 325, 350 P.2d, at 991, 992.

The court confined its deliberations to access rights, since there was no question of traffic flow loss before it for consideration. Nevertheless, in reality, traffic flow loss was comingled with access loss in the finding of fact in the trial court. Had the lower court found separate items of damages, as suggested under Arizona Revised Statutes Annotated, Section 12-1122(B) (1956), showing what part of this $10,750.00 damages was for access loss and what part for traffic flow loss, the finding would have disclosed that the lion's share was for the loss of the flow of traffic past Thelberg's commercial property, the diversion of which lowered its highest and best use from commercial to residential property resulting in a reduction of value not so much for access loss as for diversion of traffic.

The Arizona court has joined with overwhelming authority to declare as non-compensable under any circumstances the loss of traffic flow. Access means right to go onto and off of the highway and is protected by the constitution from being taken without compensation.[6] The flow of traffic past property upon a street or road is not property in any one, and its loss by diversion, above, below, to the right or to the left of abutter's premises where it was accustomed to flow, does not give rise to damages, whether there was a new taking or not and is in no way compensable.[7] The court implies this in the *Thelberg* case, when they affirm that:

> . . . if the State had built its controlled-access highway on the south side . . . instead of on the north side thereof, Thelberg would not have been entitled to recover a penny from the State for *destruction or impairment of access for the reason stated in State v. Peterson, supra*. . . .[8]

Yet Thelberg would have been damaged almost as much, since it was the loss of the flow of traffic that reduced his property value, not access loss. Access provided on the south side to an untravelled street would have been just about as poor property as access to an untravelled service road on the north. The property value loss would be the same in both cases — on the south he would be entitled to no access compensation and no traffic flow loss damages, on the north he was entitled to access loss compensation but no traffic flow losses will be seen. Had traffic been directed over Thelberg's service rooad, the market value of his remaining property would not have been diminished in value. His access problem would become moot. His real difficulty then was not loss of access, but loss of business potential from traffic diversion.

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[6] *In re* Forsstrom, *supra* note 1.
[7] Sullivan v. Carrow, 57 Ariz. 434, 114 P.2d 896 (1941).
[8] *Supra* note 4, at 325, 344 P.2d at 992.

Traffic great or small is not a special benefit or special damage to property but a general benefit or general damage that may not be taken into consideration in assessing damages. The Supreme Court of Missouri puts the shoe on both feet in *Wilson v. Kansas City*[9] where it said:

> He may not claim increase in traffic to be an element of damage any more than the Missouri State Highway Commission could claim increase in traffic in a new concrete highway to be a benefit in a condemnation suit. Traffic, great or small, is merely an incident of streets and highways, and cannot be considered either as an element of damages or benefit.[10]

In *State v. Atkins*[11] the Missouri court said in effect, traffic flow is not a special benefit to abutting land but a general benefit to the community at large.

In *State v. Carrow*[12] the Supreme Court of Arizona had before it a case where property was extensively improved along Highway 66 in Mohave County. The route of 66 was realigned in such a way that it ran in arrear of Carrow's property some 400 feet. The old road, which was connected to the new one several hundred feet on either side of the improvements, was open and usable. But by reason of the manner in which the highway was constructed upon the right of way, ingress and egress to and from the tourist and recreation area and to and from the highway was made much more difficult and inconvenient than the outlet from the premises to the old highway.

The court allowed damages for this increased difficulty of access, but in the matter of traffic flow it refused to allow damages saying that the commission had the right to change the alignment of the way for the benefit of the public even though the effect of the change would be to seriously damage or destroy the value of property along the old line. This was because the loss or destruction resulted from traffic flow loss. The court went on to follow the California case of *People v. Gianni*,[13] in which case the by-passed owner claimed damages for loss of traffic past his place of business:

> . . . We conclude that appellant seeks compensation for the loss of something . . . he had no claim of property right or ownership at any time; that, something being the right and privilege, as against the state or any one else, to perpetuate the highway along and in front of appellant's lands. This is his sole loss, and we conclude it to be non-compensable in damages.[14]

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[9] 162 S.W.2d 802 (Mo. 1942).
[10] *Id.* at 805.
[11] 51 S.W.2d 543 (Mo. Ct. App. 1932).
[12] 57 Ariz. 434, 114 P.2d 896 (1941).
[13] 122 Calif. App. 50, 20 P.2d 87 (1933).
[14] *Id.*, 20 P.2d at 89. See also Stanwood v. Malden, 157 Mass. 17, 31 N.E. 702 (1892); Cram v. Laconia, 71 N.H. 41, 51 Atl. 635, 57 L.R.A. 282 (1901).

The Arizona court went on to say:

> Since no man can have a vested right in having traffic routed by his place of business, and since it is not contended that the traffic could not, had it wished, have used the old highway instead of the new, we think in determining the depreciation in the value of the land taken, or of the larger parcel of which it is a part, the loss occasioned by the fact that traffic no longer stopped as it had, and thus defendant's improvements were of no further value, cannot be considered as an element. . . . [W]hen he erects his improvements he is bound to know, as a matter of law, that the State has the right to change the location of the highway. . . .[15]

Note that traffic flow is being considered to determine whether or not it is an item of property in an abutter that must be compensated under the constitution if taken or diverted. The California constitution is almost identical to that of Arizona. The California court in a leading case, *Rose v. State*,[16] has reached a conclusion similar to that of their appellate court, in the *Gianni* case[17] and the Arizona court in the *Carrow* case.[18] The California court develops all phases of this problem and says in part:

> While a few cases have permitted a consideration of the depreciation caused by diversion of traffic, they are contrary to the weight of authority. See 118 A.L.R. 921 et seq. . . .
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> In States such as California, where the recovery of damages depends upon the infringement of some right which the owner of land possesses in connection with his property, decisions have clearly indicated that . . . the evidence relied upon to establish such diminution must be based upon the depreciation flowing from the actionable injury which is the basis for the right to recover damages. Thus, in *People v. Gianni* . . . a small portion of land was taken for highway purposes. It was contended on behalf of the land owner that because a small portion of land had been taken and because he was entitled to recover for that injury, the damages to his remaining land should be based upon the total depreciation in the value of his remaining property even though that depreciation was caused primarily by an admittedly noncompensable element of damage, that is, diversion of traffic. The court said, however, that while diminution in market value was ordinarily the test of damage to real property, the damages must be limited to *those which accrue* by *reason* of the *legal injury* for which compensation was due. . . .(Emphasis mine)[19]

The court cited *City of Stockton v. Marengo*,[20] where the California appellate court said that evidence as to the damage caused by

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[15] State v. Carrow, 57 Ariz. 434, 440, 114 P.2d 896, 898 (1941).
[16] 19 Calif. 2d 713, 123 P.2d 505 (1942).
[17] *Supra* note 13.
[18] *Supra* note 12.
[19] *Supra* note 16, 123 P.2d 521, 520.
[20] 137 Cal. App. 760, 31 P.2d 467 (1934).

diversion of traffic by reason of highway construction was properly stricken from the record because the diminution in value resulting therefrom was not caused by any injury for which the land owner was entitled to recover damages. A similar conclusion must also be reached where damages alone is involved. Many courts have indicated that the diminution of value in such cases to be based upon elements of damage for which the land owner is not entitled to recover. This is particularly true in so far as diversion of traffic is concerned even in states where the applicable rules do not correspond to those in this state and in situations where a taking of property is also involved. Many cases supporting this propostion were cited by the court, including the Arizona case of *State v. Carrow.*[21]

Going on, the California court, in *Rose v. State,* cites the opinion of the Supreme Court of Illinois in *City of Chicago v. Spoor,*[22] and quoted at length:

> In that case the building of a viaduct impaired the land owner's right of access. In testifying as to damage, the witness admitted upon cross examination that one of the most prominent elements of damage was the altered nature of the traffic after the construction of the viaduct. The trial court refused to strike such testimony and the Supreme Court of Illinois commented . . . 'It appears . . . that the view of the court was that, while a party could not sue and recover for loss of profits to business on account of a viaduct, yet, if there was an injury to abutting property, there could be a recovery for every thing that went to make up the market value of the lots, whether it was a *diversion of traffic* or whatever it might be. This being a suit where access to the property was affected, the court seemed to have held that everything resulting from the improvement which affected unfavorably the utility of the property for business purposes was an element of damage. . . . The evidence of damages resulting from diversion of traffic or changing the method of transportation upon the street was not legitimate for *any purpose,* and opinions of witnesses based on depreciation from those causes should have been excluded.' (last emphasis added).
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> '. . . It could not be said that, if a party should sue for damages on account of a diversion of traffic, he could not recover, because he had no legal right which had been infringed, but, if he sued for damages for cutting off access to his property, he could include damages from diversion of traffic, as to which he had no legal right.'[23]

The California Court summed up the law to wit:

> Damages resulting from interference with a private rights of property must be estimated with reference to the diminution in value caused by that legal injury. The presence of a single compensable

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[21] *Supra* note 12.
[22] 190 Ill. 340, 60 N.E. 540 (1901).
[23] *Supra* note 16, 123 P.2d at 521.

injury, such as impairment of an easement, should not be made the basis for a recovery of the total depreciation in value of a landowner's property where it appears that much of the appreciation is attributable to legally non-compensable factors. . . .[24]

In *State v. Thelberg*[25] the Arizona court deals with a factual matter very similar to that of the above cases. There was one outstanding difference. In the *Thelberg* case it appears that the damages allowed Thelberg included an element of damages that was non-compensable, although the court did point out in a parable that had he been left on an old road, instead of a new service way built upon new land taken from him, there would have been no compensable injury. In the one case his access was disturbed, in the other the state merely diverted the traffic flow away from his property. Thus they allowed Thelberg damages for the injury to his access, *i.e.*, denying him direct access to the main lanes of traffic. This was based upon a finding of fact in the lower court. Here the court found that sum due for access loss. As to how much damage in terms of money was to be attributed to the loss of access and how much for traffic loss was not found.

The "before and after" formula in the *Thelberg* case makes sense if we give the proper weight to non-compensable items and apply the law of "before and after," in light thereof, by deducting from the gross diminution of market value due to all damages, that portion attributable to non-compensable items such as loss of the kings traffic. This could be ninety per cent of the total compensable damages. The court merely allowed damages, great or small for loss of direct access. This could have been as little as ten per cent of the total diminution in market value allowed by the court. Had this been pointed out in the trial and on appeal, the *Thelberg* case should have caused little concern by striking down the *Forsstrom*[26] and *Grande*[27] cases, in relation to grade change. It is evident that whether traffic, the life blood of commercial property values, is denied by grade change or re-routing of alignment, it is not to be charged against an indulging and patronizing public, once it is deemed necessary to remove this benevolent windfall from in front of formerly nourished property. As the Arizona Court says, an owner knew when he improved his land that he had no right to insist upon the continuance of the flow of traffic past his

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[24] *Ibid.* The court cited as authority City of Stockton v. Morengo, *supra* note 20; Wolf v. City of Los Angeles, 49 Cal. App. 400, 193 P. 862 (1920); *cf.* County Sanitation Dist. No. 2 v. Averill, 8 Cal. App. 2d 566, 565, 47 P.2d 786 (1935); Coast Counties Gas & Elect. Co. v. Miller & Lux, 118 Cal. App. 140, 144, 5 P.2d 34 (1931).

[25] *Supra* note 4.

[26] *Supra* note 1.

[27] *Supra* note 2.

property. He knew, and his mortgagee knew, that they were speculating upon value that lay without the pale of protection of the constitution. This they had a right to do. They could not convey, maintain or enforce this aspect as a right; it never could ripen into a property right, and any value attributed to this aspect by a market purchaser with knowledge of its potential uses is over and independent of the market value that has been accepted by courts as the measure of compensation.

The values that are pertinent to realty are the only values protected by law in condemnation cases. Speculative values, licenses or gratuities are not such interests as are figured in market value, either as comparables or purchase price. These factors must be excluded from the general formula. As said in *United States v. General Motors Corp.*:[28]

> The critical terms are 'property,' 'taken' and 'just compensation.'[29] . . . The Fifth Amendment concerns itself solely with the 'property' *i.e.*, with the owner's relation as such to the physical thing and not with other collateral interests which may be incident to his ownership.
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> In the light of these principles it has been held that the compensation to be paid is the *value* of the *interest taken*. Only in the sense that he is to receive such value is it true that the owner must be put in as good position pecuniarily as if his property had not been taken. (Emphasis added.)
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> The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of removing removable fixtures and personal property from the premises, the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to some one other than the sovereign. No doubt these elements would be considered by an owner in determining whether, and at what price, to sell. No doubt, therefore, if the owner is to be made whole for the loss consequent on the sovereign's seizure of his property, these elements should properly be considered. But the courts have generally held that they are *not* to be reckoned as a part of the *compensation* for the *fee* taken in the government. We are not to be taken as departing from the rule they have laid down, which we think is sound. Even where state constitutions command that compensation be made for property 'taken or damaged' for public use, as many do, it has generally been held that that which is taken or damaged is the *group* of *rights* which the so-called owner exercises in his dominion of the physical thing, and that damage to those rights of ownership does not include losses to his business or other consequential damages. . . .[30] (Emphasis added.)

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[28] 323 U.S. 373, 65 Sup. Ct. 357 (1944).
[29] Id. at 378, 65 Sup. Ct. at 359.
[30] Id. at 378, 65 Sup. Ct. at 360.

It has been the habit of appraisers in the past to admit of the swelling of the diminution figure by including non-compensable items. But in admitting the non-compensable nature of them, appraisers insist that the loss due to the market value doctrine must be retained in the total damage figure, compensable or not. In other words, although the courts have striven for centuries to define, pin-point and refine the rules pertaining to items of damage not to be accounted in the final estimate, yet by the simple device of citing the general "market value before and after" rule, all items that inspired the purchaser of comparable property to pay what he did has been considered and paid. The "before and after" rule is very general. It applies in some cases, but is so encumbered with exceptions that sight of the rule is often difficult to retain. An example appears in the language of the *Thelberg* case, where in general terms the court advises:

> The measure of damages for the destruction or impairment of access to the highway upon which the property of an owner abuts is the differenece between the market value of the abutting property immediately before and immediately after the destruction or impairment thereof.[31]

Stated thus, allowing no exceptions, this rule is a paradox and impossible in most cases, under the Arizona Constitution, to apply. Firstly, we are compelled to pay the just value of the part taken in money.[32]

The statutes provide that special benefits may be charged against special damages. In some cases special benefits are so much greater than special damages that the property is worth more after the taking than before. The "before and after" rule applied to the whole property in this case would deny the owner compensation for the land taken, since you would pay him the difference between value before and after and this would leave him owing the condemner.

In another aspect you would be charging the owner as for special benefits a general benefit to the whole community. General benefits to the community resulting in enhancement to property is a property right of abutting owners that must be compensated. Yet on the "before and after" basis this benefit would be reflected in the total damage as a charge against the owner and would deprive him of property without compensation. Suppose there was $500 special damage, no special benefit, but a $500 general benefit. The owner would be entitled to the $500 general benefit but on the "before and after" formula he would be paid nothing.

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[31] *Supra* note 4, at 325, 350 P.2d at 992.

[32] Mandel v. City of Phoenix, 41 Ariz. 351, 18 P.2d 271 (1933); ARIZ. CONST. art. 2, § 17; ARIZ. REV. STAT. ANN. § 12-1122 (1956).

The rule applied, as suggested in the *Thelberg* case, would have the result of cancelling the effect of all non-compensable damages, thus causing the State to pay for all of the items the courts have said we may not pay — such as values for unlawful use; speculative values; inflated values; sentimental, hoped for and planned values; values for capricious reasons; values based upon gratuitous privileges; and for anything that might appeal to a buyer whether the vendor was possessed with a property right or not.

The court means that the test of compensation to abutting land when access is taken or injured is the diminution in value of the part not taken due to taking measured on the "before and after basis." That is the loss in value to the remainder from the compensable item alone. What has it lost due to taking of access? The rule is not said to apply to other losses that may be non-compensable. It applies to all losses that amount to the taking of a real property right, if cash is paid for the land taken and special benefits are equal to or below special damages. All the court was trying to say was that access loss is not priced as such but is to be valued at what it furnishes to enhance the value of the land taken and left. It is the land as enhanced by the improvement principle in reverse, or value of the land as damaged by the improvement. The matter should be further cleared up by a consideration of the several cases beginning with excerpts from the New Mexico case of *Bd. of Comm'n v. Slaughter*,[33] almost identical to the *Carrow* case[34] in point of fact and application of law.

> . . . The point upon which the parties differ is as to what elements may be considered in arriving at 'just compensation' for the land not actually taken, but under the circumstances, adversely affected, or, as the owner would say, 'damaged'.
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> The general rule for arriving at just compensation for property not taken but adversely affected is the so-called 'before and after' rule; and this poses the question: What was the value before the taking; and what is now the market value after the taking? The owner of the property, ordinarily, is entitled to receive the difference between these sums. . . . However, the vast majority of the courts appove a definite exception to this rule in that it is recognized that there are elements of damage for which no compensation will be given though the market value may be adversely affected. . . . Specifically, with reference to this case, the rule is that ordinarily no person has a vested right in the maintenance of a public highway in any particular place. That exception is based upon the consideration that the State owes no duty to any person to send public traffic past his door. . . .[35]

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[33] 49 N.M. 141, 158 P.2d 859 (1945).
[34] *Supra* note 12.
[35] *Supra* note 33, 158 P.2d at 860.

One of the leading cases is the Vermont case of *Nelson v. State*,[36] where the question presented is almost identical with that in the *Thelberg* case.

> In diverting traffic from in front of Nelson's buildings to the new route there is no invasion of their rights nor is there any legal injury to the land remaining. Access to their buildings remains unchanged. The buildings and lands . . . will remain exactly as before establishment of the new route except that travel past the buildings will doubtless be diminished. But the State owes no duty to the Nelsons in regard to sending public travel past their door. Our trunk line highways are built and maintained to meet public necessity and convenience in travel and not for the enhancement of property of occasional land owners along the route. Benefits which come and go with changing currents of public travel are not matters in which any individual has any vested right against the judgment of those public officials whose duty is to build and maintain these highways. The Nelsons are not entitled to receive any compensation for diversion of traffic as allowed in the last item set forth in the elements of damages.[37]

The New Mexico court, in *Bd. of Comm'n v. Slaughter*,[38] cited the South Carolina case of *Wilson v. Greenville County*,[39] which was a case similar to the *Carrow*[40] and *Slaughter*[41] cases, where there was a physical taking and construction upon new lands taken from the condemnee, but where the major diminution of value was due, as it was in the *Thelberg*[42] case, to traffic flow loss via diversion thereof. In these cases there was no taking of access, but since this is an easement, an interest in land (lands, tenements, and hereditaments), it can be no more or less than the new lands taken for highways purposes and can be treated no differently. In this light then, all of these cases are parallel, in that there was a taking of a real property interest. The rules are the same whether the interest being taken or damaged is a fee, mortgage, lease or easement. The point then is in all of these cases — there are two things in common — the taking of a real property interest in some of the lands of the condemnee, and diverted traffic. This diversion could have been by elevation above the premises as in the *Thelberg* case; to the south as in the *Carrow* case; or horizontally as in the *Wilson*[43] and *Slaughter*[44] cases, or as in the *Ricciardi*[45]

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[36] 110 Vt. 44, 1 A.2d 689 (1938).
[37] *Id.*, 1 A.2d at 693.
[38] *Supra* note 33.
[39] 110 S.C. 321, 96 S.E. 301, 302 (1918).
[40] *Supra* note 12.
[41] *Supra* note 33.
[42] *Supra* note 4.
[43] *Supra* note 39.
[44] *Supra* note 33.
[45] People v. Ricciardi, 23 Calif. 2d 390, 144 P.2d 799 (1943).

case; and the effect would have been the same — new ground or real property interest would have been taken and the loss caused to the changed market value compensated by application of the "before and after" rule confined to that element of loss. But in none of these cases have the courts allowed the item of traffic flow loss to be included where it was pointed out and preserved in the record. In the *Wilson*[46] case the South Carolina court, after reciting the rule that no person has a vested right in the continuance of a highway at public expense, said:

> . . . Respondents concede that such is the law, and that, if the old road had been merely discontinued as a public highway, without relocating it on respondent's land, he would not be entitled to damages; but they contend that the abandonment of the old and the location of the new road on the same tract of land are so closely connected that they are inseparable. The contention is unsound. *The two acts* are *separate* and *distinct* in *fact* and in *law*, and the legal consequences are the same as if the old and the new road had been on the land of different owners.[47] (Emphasis added.)

The most controversial case pertaining to access loss is the *Ricciardi*[48] case. This case is for our purpose on all fours with the *Thelberg* case. Here the by-pass was a grade lowering, while in the *Thelberg* there was a grade raising; in both access was limited to the next intersections, and both put on one way service ways. In the *Ricciardi* case, if we consider it in its true light, we shall be able to better understand its import. The California court had a case before it where the owner was left on two service roads and was denied direct access to the main channels of controlled traffic lanes. The access was so complicated that the engineer that designed it would have run out of gas attempting to drive off and onto the owner's remnant left from any approach to that labyrinthic swirl of traffic lanes. This was not mere access regulation, it was regulation beyond the pale of reason, and a taking. The state failed to separate access damage from traffic flow loss, so that the issue was, as in the *Thelberg* case, one of mere access loss; but the court had a feeling that greater losses would come from traffic diversion *loss*, not access loss, and hedged by pointing out after the usual recitation concerning the "before and after" rule:

> Of course, as above indicated, in applying this rule damages may not be allowed for diminution of property value resulting from highway changes causing diversion of traffic, circuity of travel beyond an intersecting street, or other non-compensable items.[49]

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[46] *Supra* note 39.

[47] *Supra note* 38, 96 S.E. at 302. See also *In re* Johnson, 344 Pa. 5, 23 A.2d 880 (1942); People v. Gianni, *supra* note 13, 20 P.2d at 89; Heil v. Alleganey, 330 Pa. 449, 199 Atl. 341 (1938).

[48] *Supra* note 45.

[49] *Supra* note 45, 144 P.2d at 805. See also Rose v. State, *supra* note 16; Bacich v. Bd. of Comm'n, 23 Cal. 2d 343, 144 P.2d 818 (1943).

> We recognize that defendants have no property right in any particular flow of traffic over the highway adjacent to their property, but they do possess the right of direct access to the through traffic highway. . . . If traffic normally flowing over that highway were re-routed or if another highway were constructed which resulted in substantial amount of traffic being diverted from that through highway the value of their property might thereby be diminished, but in such event defendants would have no right to compensation by reason of such re-routing or diversion of traffic. The re-routing or diversion of traffic in such a case would be a mere police power regulation, or the incidental result of a lawful act, and not the taking or damaging of a property right.[50]

Is it not obvious that the sheep should be separated from the goats, that is, the loss of the easement of ingress and egress from the loss of traffic flow? If not, how then prevent the payment of damages to every property owner in downtown Phoenix and Tucson due to the bypassing of old routes by new expressway facilities?

The same principle is involved in every such improvement. They have no access loss problem, but like the hypothetical owner across the road from Thelberg, have a traffic problem. The traffic is diverted around them by a lateral curve of new alignment taking traffic from the front and directing it away to the south or west or what have you. Could it be said, that had the new controlled access facility been built overhead or submerged below grade and the traffic re-routed above or below abutting property, that in all cases where access was adversely affected the loss due to access taking, plus the loss in value due to traffic diversion, would be required to be compensated, but that where traffic was diverted around such property on a lateral plane and access was not disturbed there could be no payment required? The test of damage is what right has been impaired for a public necessity and what proximately caused the damage. Was the damage caused by a lawful exercise of the police power or was it a taking under the power of eminent domain? The former is *damnum obseque injuria,* the latter is a taking and compensable.

The practical use of these tools calls for an understanding with the appraiser. He needs to be required to estimate the sum of damage caused by access loss and the sum of money that equals the noncompensable loss of traffic flow diversion. As an appraiser, he need be only as sharp as the buyer in the market, who has little difficulty in determining how such incidents affects his purchasing judgment.

The trial lawyer needs to urge these points in the trial court, asking questitons and requiring instructions and demanding the separation of each and every element of damages in the verdict or findings under

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[50] *Supra* note 45, 144 P.2d at 805.

Arizona Revised Statutes Annotated, section 12-1122(B) (1956). There is involved here hundreds of thousands of dollars of the public funds. The problem is not merely the immediate concern of the local officers charged with the construction of Federal aid roads, but will either aid or embarrass local officials for generations to follow, when no central government will stand with funds for right of way purchase. Then, all such funds will be raised by local taxation. The rules of valuation evolved today, will control the price local governments will be compelled to pay tomorrow.