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Eminent Domain--Interference with Access to Land Is Non-Compensable When Caused by Street Improvements for the Purpose of Traffic Regulation

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mention a nexus or relationship requirement for a finding of state action, and apparently is consistent with the plaintiff-appellants position in the *Jaycees* case, that the state must not deal with discriminators. However, in view of the most recent line of decisions,[20] the Tenth Circuit appears strongly committed to the nexus test for determining state action.

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EMINENT DOMAIN—INTERFERENCE WITH ACCESS TO LAND IS NONCOMPENSABLE WHEN CAUSED BY STREET IMPROVEMENTS FOR THE PURPOSE OF TRAFFIC REGULATION. *Brewer v. City of Norman*, 527 P.2d 1134 (Okla. 1974).

The plaintiff in *Brewer v. City of Norman*[1] sought property damages in an inverse condemnation action against the city of Norman. The basis of his cause of action was interference with access to his property, on which he conducted a television repair business, as a result of street improvements undertaken by the city. It was the plaintiff's contention that in widening the street on which his property abutted and constructing a center median, which prevented northbound traffic from entering his property, the city had caused compensable damages to his property.

The trial court awarded the plaintiff compensation for this impairment of access to his property, but in an eight-to-one decision, the Oklahoma Supreme Court held that the trial court had erred in overruling the defendant city's demurrer and reversed the judgment.[2] In the opinion of the supreme court, the actions of the city were an exercise

scheme connotes governmental approval of the activity; (4) the extent to which the organization serves a public function or acts as a surrogate for the state; and (5) whether the organization has legitimate claims to recognition as a "private" organization in associational and constitutional terms.

20. Ward v. St. Anthony's Hospital, 476 F.2d 671 (10th Cir. 1973); Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969).

1. 527 P.2d 1134 (Okla. 1974).

2. *Id.* at 1137.

of the police power; and, therefore, the plaintiff had the burden of showing that the city's actions were unreasonable, arbitrary, or capricious. If the plaintiff fails to carry this burden, any action taken under the police power of the state falls within the meaning of the maxim *damnum absque injuria.*[3]

At first glance, this appears to be a harsh decision carrying with it the sweeping consequence of denying any compensation to property owners who suffer consequential damages from road construction projects. In light of the trend to interpret broadly governmental powers and to invoke the police power as an alternative to eminent domain proceedings to accomplish the goals of environmentalists and other interest groups,[4] this decision conjures up the spector of the private owner being unceremoniously brushed aside whenever the "public interest" is sought to be served.

However, placed in the proper context, *Brewer* does not represent a shift in authority in Oklahoma, but it is a decision that is limited to its own peculiar facts. In reality, it is an exception to the rule of compensability in such cases; and, curiously, an earlier case has already created an exception to the exception.[5] *Brewer* should be limited to situations that are strictly analogous factually, and a review of the existing Oklahoma authority supports that conclusion.

Article II, section 24 of the Oklahoma constitution provides in part that "[p]rivate property shall not be taken or *damaged* for public use without just compensation."[6] This section of the Oklahoma constitution has long been interpreted as requiring compensation for any consequential injury sustained by a property owner,[7] and there is an impressive line of authority supporting the position that Oklahoma recognizes the right of access as property.[8]

Although the owner must show that the damages are special (that his damages are different in kind rather than degree from those of the public),[9] and although the courts state that "mere forced circuity of

3. *Id.* at 1136.
4. *See* Haik, *Police Power Versus Condemnation,* 7 NATURAL RESOURCES L. 21 (1974).
5. State *ex rel.* Dep't. of Highways v. Bowles, 472 P.2d 896 (Okla. 1970).
6. OKLA. CONST. art. II, § 24 (emphasis added).
7. Oklahoma City v. Vetter, 72 Okla. 196, 179 P. 473, 4 A.L.R. 1009 (1919).
8. *See, e.g.,* Oklahoma Turnpike Authority v. Chandler, 316 P.2d 828 (Okla. 1957); Grand River Dam Authority v. Misenhimer, 195 Okla. 682, 161 P.2d 757 (1945); Atchison, T. & S. F. Ry. v. Terminal Oil Mill Co., 180 Okla. 496, 71 P.2d 617 (1937).
9. Grand River Dam Authority v. Misenhimer, 195 Okla. 682, 686, 161 P.2d 757,

travel" does not give rise to a right of compensation,[10] the cases have established that whether the owner's access has been "materially impaired" is a question of fact,[11] and that this protected right of access is not limited to access by the owner.[12] Despite the fact that the owner's right to compensation is created by interference with access to his property, the measure of damages is the reduction in market value of the property caused by the loss of access.[13]

Therefore, the weight of authority dictates compensation to the owner of property when access to that property is impaired. On its face, the *Brewer* decision is contrary to this stream of authority, and the apparent inconsistency in the decision, in light of the factual similarity, is the major premise of the dissenting opinion.[14] However, the difficulty lies in the fact that the factual similarity overshadows the distinction upon which the majority chose to base its opinion.

In *Brewer*, the majority found that the improvements built by the city were for the purpose of regulating traffic.[15] The key word in this context is "regulation." While the consequences of classifying an act of government as one or the other is considered axiomatic in that condemnation requires compensation and an exercise of police power gives no right to compensation, the distinction between the two is often difficult to clearly define. The Supreme Court of the United States, in *Goldblatt v. Town of Hempstead*,[16] had occasion to explore the subtle distinctions between acts of the police power and condemnation proceedings governed by the concept of eminent domain. The Court's opinion suggests that it is necessarily a question of the particular circumstances of each case as to whether the governmental act involved is to be classified as one pursuant to the exercise of eminent domain or as one of police power, and that the distinction is identical to the one between a "taking" and "regulation."[17]

The failure of the majority opinion to consider the distinctions between the circumstances of *Brewer* and those of the earlier cases makes it necessary to examine those cases to find the fallacy of the dissenting

761 (1945); Atchison, T. & S. F. Ry. v. Terminal Oil Mill Co., 180 Okla. 496, 497, 71 P.2d 617, 618 (1937).

10. 180 Okla. at 498, 71 P.2d at 619.
11. State *ex rel.* Dep't. of Highways v. Aker, 507 P.2d 1227 (Okla. 1973).
12. State *ex rel.* Dep't. of Highways v. Bowles, 472 P.2d 896 (Okla. 1970).
13. *Id.* at 900.
14. 527 P.2d at 1137.
15. *Id.* at 1136.
16. 369 U.S. 590 (1962).
17. *Id.* at 594.

opinion; but upon careful reflection, the distinction seems obvious. In the principal cases cited by Justice Berry in his dissent, the governmental action was not directed to regulation of traffic on existing streets or highways. In short, the cases cited by Justice Berry are characterized by either new highway construction[18] or construction totally unrelated to regulation of traffic.[19] Although the majority apparently felt no compulsion to distinguish these cases from *Brewer*, this is surely the distinction which explains the superficial inconsistency of their decision. In addition, this distinction explains the absence of any discussion of the police power in these early decisions.

However, one case cited by Justice Berry does involve a question of an exercise of police power, and the decision in that case, *State ex rel. Department of Highways v. Bowles*[20] merits further consideration. The basic fact pattern of *Bowles* invites the application of the police power argument to deny compensation. The property involved was the location of a drive-in restaurant abutting an existing public highway, and the interference with access complained of was created by the closing of an intersecting street in order to create a limited-access highway. The State Department of Highways argued that the closing of the intersecting street was a valid exercise of the state's police power and cited authority from another jurisdiction to support its position.[21]

However, the Oklahoma Supreme Court avoided passing on this issue which had not previously been decided in this jurisdiction, by seizing upon an additional fact which was not present in *Brewer*. In *Bowles*, the construction also resulted in an actual taking of a portion of the owner's property. Therefore, the court held that since the measure of his damages for the actual taking included consequential damages equal to the decrease in value of his remaining property, it would be arbitrary and burdensome for the courts of this state to require a party to differentiate his consequential damages caused by the actual taking of part of the property and those caused by his loss of access.[22] The conclusion is obvious that to the extent that *Bowles* is still followed

18. Oklahoma Turnpike Authority v. Chandler, 316 P.2d 828 (Okla. 1957) (existing highway closed by construction of new limited-access highway).

19. Grand River Dam Authority v. Misenhimer, 195 Okla. 682, 161 P.2d 757 (1945) (highway inundated by man-made lake); Atchison, T. & S. F. Ry. v. Terminal Oil Mill Co., 180 Okla. 496, 71 P.2d 617 (1937) (street obstructed by raised railroad grade).

20. 472 P.2d 896 (Okla. 1970).

21. Ray v. State Highway Comm'n., 196 Kan. 13, 410 P.2d 278 (1966); Brock v. State Highway Comm'n., 195 Kan. 361, 404 P.2d 934 (1965).

22. 472 P.2d at 900-01.