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Eminent Domain—Taking and Damaging: Injunction Against Taking Prior to Payment of Damages—Wandermere Corp. v. State, 79 Wn.2d 688, 488 P.2d 1088 (1971)

anon

EMINENT DOMAIN—TAKING AND DAMAGING: INJUNCTION AGAINST TAKING PRIOR TO PAYMENT OF DAMAGES—*Wandermere Corp. v. State*, 79 Wn.2d 688, 488 P.2d 1088 (1971).

The Wandermere Corporation owned one mile of frontage along an open-access highway. The state planned to build a drainage facility along the highway, wholly on state-owned property. Wandermere claimed that the proposed facility, an open ditch, would lower the underground water table on its land and interfere with access rights to its property. Wandermere further alleged that the Washington constitution prohibited such state interference with property rights until there was both a judicial determination that the project would be for a public use and until damages to the property had been ascertained and paid in the manner provided by law. The trial court denied Wandermere's request for an injunction to halt the project until the state complied with these constitutional requirements. The state supreme court reversed, holding that Wandermere was entitled to an injunction prohibiting further construction of the drainage facility until such time as petitioner's damages had been ascertained and paid and the character of the interference with the underground water table determined. *Wandermere Corp. v. State,* 79 Wn.2d 688, 488 P.2d 1088 (1971).

The constitutional principle that private property shall not be taken for public use without just compensation has been a limitation on the inherent sovereign power of eminent domain since the founding of the Republic.[1] Nevertheless, judicial interpretation of the types of property interests which could be "taken" was very narrowly defined in early decisions and was generally discussed in terms of physical invasion of land.[2] Gradually, the notion that property is a physical thing eroded and was replaced by the more sophisticated concept that prop-

1. *See, e.g.,* U.S. CONST. amend. V.

2. In Callender v. Marsh, 18 Mass. (1 Pick.) 418 (1823), a man's house was in danger of falling over because the city of Boston had removed the lateral support by lowering a street grade. Even though the affected owner would have to go to great expense to shore up his home, no recovery was allowed since the city had not taken any of his soil. A change in grade, if done in a proper manner and with legislative authorization was not actionable at common law regardless of the damage caused. In Smith v. Washington, 61 U.S. (20 How.) 135, 148 (1857) the Court said: "The law on this subject is well settled, both in England and this country. The cases are too numerous for quotation . . . ." As late as 1910, what we regard today as intangible property rights were referred to in physical terms. In United States v. Welch, 217 U.S. 333 (1910), Mr. Justice

erty is an aggregate of rights a person enjoys with respect to the res. The United States Supreme Court has stated that property is every sort of interest the citizen may possess.[3] More recently, the Washington Supreme Court in *Ackerman v. Port of Seattle* stated:[4]

> Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use.

Prior to this judicial development, however, there were those who were unwilling to wait for the court to expand the scope of protected property. Beginning with Illinois in 1870,[5] attempts were made to remedy the injustices caused by the physical taking limitation on recovery for damages in eminent domain by inserting additional protective language in many state constitutions.[6] Constitutions were adopted which, as Washington's,[7] provided that private property should not be taken *or damaged* for public use without just compensation being paid. The "or damage" provision was recognized by most courts as having abrogated the strict "physical" property notions traditionally associated with the taking provision.[8] Yet it was unclear to what extent new rights were created by the addition of the term.[9]

Holmes stated: "A private right of way is an easement and is land." Again, in Less v. City of Butte, 28 Mont. 27, 72 P. 140, 141 (1903) the court said:

> Constitutions which provide that "private property shall not be taken for public use without just compensation" are but declaratory of the common law, and contemplate the physical taking of property only.

3. United States v. General Motors, 323 U.S. 373, 378 (1949). Even so, the Supreme Court still clings to physical invasion language in its opinions. *See* United States v. Causby, 328 U.S. 256 (1946) (damage to farm from noise and vibration from direct overflights of aircraft held compensable under a trespass theory). The fifth amendment to the United States Constitution contains only a taking provision.

4. 55 Wn.2d 400, 409, 348 P.2d 664, 669 (1960).

5. ILL. CONST. art. II, § 13.

6. For a list of states with damaging provisions see Stoebuck, *A General Theory of Eminent Domain,* 47 WASH. L. REV. 553, 555 n.8 (1972).

7. WASH. CONST. art. 1, § 16.

8. Early state court decisions openly reflected this extension of protection. *See* Reardon v. City of San Francisco, 66 Cal. 492, 6 P. 317 (1885); Less v. City of Butte, 28 Mont. 27, 72 P. 140 (1903); Harmon v. City of Omaha, 17 Neb. 548, 23 N.W. 503 (1885); Fernandis v. Great N. R.R. 41 Wash. 486, 84 P. 18 (1906); Brown v. Seattle, 5 Wash. 35, 31 P. 313 (1892). *But see* Eachus v. Los Angeles Consol. Elec. R.R., 103 Cal. 614, 37 P. 750 (1894); Rigney v. Chicago, 102 Ill. 64 (1881); Smith v. St. Paul, M. & M. R.R., 39 Wash. 355, 81 P. 840 (1905).

9. In Chicago v. Taylor, 125 U.S. 161 (1888), Mr. Justice Harlan noted that such a change in the organic law of the state could not have been meaningless, and was in-

In recent years Washington has been perhaps the most liberal state in construing its "or damage" provision. In the leading decision, *Martin v. Port of Seattle,*[10] the court permitted recovery by homeowners near the Seattle-Tacoma airport for decreased property values occasioned by the noise and vibrations of the aircraft taking off and landing. *Martin,* however, has been criticized for its failure to distinguish between the two concepts "taking" and "damaging."[11] Wandermere is the first post-*Martin* decision to attempt to make that distinction and to clear up other ambiguities regarding the operation of the eminent domain provision of the state constitution. The remainder of this note will analyze the adequacy of the *Wanderemere* distinction between a taking and a damaging; whether the damaging provision of the Washington constitution requires a judicial finding that the contemplated project is for a public use; and the propriety or necessity of issuing injunctions in cases of this kind.

The *Wandermere* court distinguished between taking and damaging as follows:[12]

> Where such interference is mere happenstance, fortuitous or of inconsequential dimension, that interference may properly be classified as a "damaging." Where, however, the character of the governmental interference with private property rights is planned, deliberate and *substantial,* such interference, upon proper factual showing, should be

tended to give private property owners greater security than they had under the former constitution. The damaging provision was primarily addressed to the change of grade cases, especially to Callender v. Marsh, 18 Mass. (1 Pick.) 418 (1823), and its doctrinal successors. *See* Stoebuck, *The Property Right of Access Versus the Power of Eminent Domain,* 47 TEXAS L. REV. 733 (1969). The handling of this provision has been in flux since its inception, and there is wide disagreement among the courts in its application.

10. 64 Wn.2d 309, 391 P.2d 540 (1964), *cert. denied,* 379 U.S. 989 (1965).

11. *See* Comment, *Inverse Condemnation in Washington—Is the Lid Off Pandora's Box?,* 39 WASH. L. REV. 920 (1965); Spater, *Noise and the Law,* 63 MICH. L. REV. 1373 (1965); Tondel, *Noise Litigation at Public Airports,* 32 J. AIR L. & COM. 387 (1966). The above writers took the position that the distinction between taking and damaging is a matter of degree, whereas the *Martin* court thought the distinction was not useful. The *Martin* opinion would allow recovery for even small claims.

12. 79 Wn.2d at 693, 488 P.2d at 1092. It should be observed at the outset that, analytically, there should be no distinction between taking and damaging. As this note indicates, the first issue to be decided is what is meant by the term property. To the extent one has property and is then deprived of some or all of it, does it really make any sense to discuss whether it was done by taking or damaging? One either has or has not property. One can neither take nor damage what another does not have. It is also true that one can have property taken, and yet have no damages because of offsetting benefits. *See* State *ex rel.* Eastvold v. Yelle, 46 Wn.2d 166, 279 P.2d 645 (1955); WASH. REV. CODE § 8.04.080 (1959); WASH. REV. CODE § 8.12.190 (1959). However, this only goes to the issue of how much harm is suffered, not to whether there is a taking.

deemed a "taking" thereby requiring prior adjudication of public use and necessity under Const. art. 1, § 16 (amendment 9).

By saying that a taking involves planned and deliberate interference, while a damaging involves mere happenstance or is fortuitous, the court implied both that intentional harm to property could not qualify as a damaging and that a fortuitous damage could not qualify as a taking. However, the court did not define what it meant by "planned and deliberate." If by planned and deliberate the court meant the plan as approved by the legislature at the policy level, then a subsequent damaging at the operational level which was not anticipated by the plan would be "fortuitous" and unplanned, even if the state were notified prior to the damaging. As a result, substantial harm which would otherwise qualify as a taking would be deemed a damaging and therefore not qualify for a hearing on public use and necessity.[13] Alternatively, if the court meant that if the state had notice at the operational level of prospective interference, any subsequent deprivation of property rights would be planned and deliberate, then subsequent substantial damage would qualify as a taking, and the right to a hearing on public use and necessity would be preserved. Moreover, it is not clear whether that which is "planned" includes unintentional results as well as those which are clearly intended.[14]

The intent distinction creates the possibility that the existence or non-existence of intent, a factor irrelevant to the amount of harm suffered, will be determinative in deciding whether a public use determination by the court is required. The court would have been better advised to avoid any mention of intent. The federal courts have abandoned the intent test for a constitutional taking under the fifth amendment on the grounds that the constitutional provision is addressed to whether the condemnor did that which was prohibited, rather than to an inquiry into the state of mind of the officials who acted to take the property.[15]

13. The court states that prior adjudication of public use and necessity is not necessary when there is only a damaging. *See* note 29 and accompanying text, *infra*.

14. For instance, when the state plans for a garbage dump, does the plan include the incident odors? The state may know what odors will be a probable consequence of the existence of the garbage dump, but what is really planned for and intended is a disposal system, not the odors.

15. Lack of intent to take does not render a physical appropriation any less a taking. 2 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 6.21 (1970). In United States v. Causby, 328 U.S. 256, 267 (1943) the Court said: "We need not decide whether

Although the court should not have included intent in its definition of damaging, the court wisely did not require substantial harm for there to be a damaging. Thus, the court reaffirmed *Martin* and departed from the majority rule. From the earliest decisions involving the damaging provision most, but not all[16] courts have required that damage, in order to qualify as a constitutional damaging, be substantial,[17] whereas no such requirement has been made for cases involving a physical taking. If a physical taking were involved, the damage resulting could be slight,[18] or none at all, [19] or it could be that a benefit would accrue from the taking,[20] yet the affected owners had the full force of court-supplied remedies to vindicate their rights. At times it made no difference that the benefit to the public would be great and the harm to the individual slight in comparison.[21]

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repeated trespasses might give rise to an implied contract. . . . If there is a taking, the claim is founded upon the Constitution. . . ." *Causby* involved an air easement over plaintiff's farm taken by low flying aircraft. In Portsmouth Co. v. United States, 260 U.S. 326, 330 (1922), the United States built a fort near the complainant's land and fired guns over his property. Mr. Justice Holmes said: "If the acts amounted to a taking, without assertion of an adverse right, a contract would be implied, *whether it was thought of or not.*" (emphasis added). *See also* Jaynes v. Omaha Street R.R., 53 Neb. 631, 74 N.W. 67 (1898).

16. *See* Britt v. City of Shreveport, 83 So. 2d 476 (La. Ct. App. 1955) (even though property value was minimally affected, damages were allowed for diminished access); Omaha & N.P. R.R. v. Janecek, 30 Neb. 276, 46 N.W. 478 (1890) (recovery allowed for depreciation in value of land from soot, noise, etc., from a railroad, no part of which was on Janecek's land).

17. *See* Brady v. Tacoma, 145 Wash. 351, 259 P. 1089 (1922); Rigney v. Chicago, 102 Ill. 64 (1882); Jacobs v. City of Seattle, 93 Wash. 171, 160 P. 299 (1916). But even substantial damage was not always enough by itself to warrant recovery. *See* Smith v. St. Paul, M. & M. R.R., 39 Wash. 355, 81 P. 840 (1905); Albers v. County of Los Angeles, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965); People *ex rel.* Dept. of Public Works v. Symons, 54 Cal. 2d 855, 357 P.2d 451, 9 Cal. Rptr. 363 (1960).

18. *See, e.g.*, Hagerstown v. Young, 125 Md. 482, 94 A. 96 (1915) (the city was enjoined from changing the grade of part of a lot). In Robert v. Sadler, 104 N.Y. 229, 10 N.E. 428, 430 (1887) the court stated:

> [T]he smallness of the value does not justify a seizure of the fee without due and lawful authority, or its destruction by indirect rulings. No invasion of the property rights of the citizen can safely be deemed trifling.

19. Gilzinger v. Saugerties Water Co., 66 Hun 173, 21 N.Y.S. 121, *aff'd*, 142 N.Y. 633, 37 N.E. 566 (1894). The court stated that it made no difference that the riparian owner was not damaged by the diversion of water from his lands. The right to the natural flow was guaranteed to him by law and he could not be divested of that right without voluntary relinquishment or condemnation.

20. *E.g.*, Minnich v. Lancaster, M. & N. H. R.R., 10 Pa. Dist. 126, 24 Pa. County Ct. 312 (1900).

21. *See* Stock v. Jefferson Township, 114 Mich. 357, 72 N.W. 132 (1897) (town enjoined from diverting headwaters); Doty v. Village of Johnson, 84 Vt. 15, 77 A. 866 (1910) (the fact that damage suffered by a property owner is slight when compared to the benefit to the public from raising a dam did not affect the court's determination of whether to enjoin the project).

One reason for the disparate results in damaging and taking cases was that the character of the invasion in taking cases was clear to the courts. As the physical notions of property were well ingrained in law, the judiciary was quick to insist on the protection of property from unlawful appropriation. Yet since the damaging provision was addressed to harm to non-physical property,[22] the courts apparently found it difficult, in view of the strong physical view of "taking" property, to understand or adequately acknowledge the expanded, more sophisticated notions of property. The decisions using the "physical"-"non-physical" language were hopelessly confused.[23] As a consequence, there was a failure to incorporate the same ardent adherence to adequate remedies for violations of these newly recognized rights. The *Wandermere* decision gives protection to all property whether it is "physical" or "non-physical." If any property interest is invaded, compensation will be awarded.

In addition to omitting the requirement of substantial damage from the test for a damaging, the *Wandermere* court wisely omitted from the tests for taking and damaging a criterion which has been used in many jurisdictions when interpreting their damaging or taking provisions. When no part of an individual's land was physically appropriated, the plaintiff was often required to prove that he suffered damages in excess of that sustained by the public as a whole in order to recover.[24] While on its face this test seems reasonable, its application has resulted in many inequitable decisions. For example, in *Thomson*

22. *See* note 8 and accompanying text, *supra*.

23. In Smith v. St. Paul, M. & M. R.R., 39 Wash. 355, 81 P. 840 (1905), the court allowed recovery for damages caused by soot and cinders from a railroad, no part of which was on the plaintiff's land, but denied recovery for "non-physical" damage from noise and vibration. Recovery appeared to be based on the visibility of the ashes and cinders, since both ashes and noise were necessarily incident to the operation of the railroad, both could be scientifically (physically) measured, and both caused damage. In addition, *Smith* denied recovery for damage due to odors. Yet in Aliverti v. City of Walla Walla, 162 Wash. 487, 298 P. 698 (1931), the court held that odors from a nearby sewage disposal plant were damaging. Although the court in *Smith* allowed damages from soot and cinders, the court denied recovery for the same damage in DeKay v. North Yakima & V. R.R., 71 Wash. 648, 129 P. 574 (1913), and in Taylor v. Chicago, M. & St. P. R.R., 85 Wash. 592, 148 P. 887 (1915). *Smith* was not overruled by any of the subsequent decisions cited above.

24. The requirement of substantial damage was sometimes coupled with the particular damage test in actions where no land was appropriated, probably in order to give credibility to the notion that the damage suffered really was in excess of that sustained by the public as a whole. This was true for takings. *See* Thornburg v. Port of Portland, 244 Ore. 69, 413 P.2d 750, 752 (1966). It was also true for damagings. *See* Rigney v. Chicago, 102 Ill. 64 (1882).

v. State[25] the court refused to state that there was a constitutional damaging even though a four-lane highway passed within ten feet of plaintiff's bedroom and the protection of his home from cars which might leave the road was inadequate. Whenever a property right is disturbed, the holder of the property interest has suffered a damage in excess of the community as a whole, for while the "community" does not have any of its rights disturbed, the property owner does. The *Wandermere* court made it clear that this result will follow since damages are to be allowed for *any* invasion of property rights. The fundamental problem for the court after *Wandermere* will therefore be to determine what is property.[26]

An unfortunate result of the court's use of the taking-damaging distinction is in the area of public use determination. A long line of decisions in Washington has held that what is a public use is, in the final analysis, a judicial question.[27] Since all prior decisions dealt with takings, the *Wandermere* court had to determine for the first time whether such an adjudication was necessary for a damaging.[28] The court elected to view the constitution as requiring an adjudication of public use and necessity only when there is a taking, but not when

25. 284 Minn. 468, 170 N.W.2d 575 (1969). *See also* Batten v. United States, 306 F.2d 580 (10th Cir. 1962).

26. It is not the task of this note to define what property is, but rather emphatically to point out that once acceptable standards for property have been formulated, as they have for taking "physical" property, the full weight of judicial power can be used to protect those rights.

Property rights are not unlimited. They are circumscribed by social rules, and may be reasonably regulated in their use and disposition. *See* 1 J. LEWIS, EMINENT DOMAIN § 63 (3rd ed. 1909). Reasonable regulation falls under the heading of police power. *Id.* § 6. To the extent there is police power, there is not private property. There are also occasions where property may drop in value, yet not fit within the categories of eminent domain or the police power, and for which no recovery will be allowed. If a competing business draws away customers from another, the latter has no cause of action against the former (assuming nothing otherwise unlawful was done to attract them) since no business has a property right in customers. Omaha Horse R.R. v. Cable Tram-Way Co. of Omaha, 32 F. 727, 732 (8th Cir. 1887).

It is for the courts to decide whether there is or is not property involved, and if there is, and it has been appropriated for public use, then the property owner has a remedy, regardless of how slight the interference.

27. Two of the most recent decisions are Des Moines v. Heneway, 73 Wn.2d 130, 437 P.2d 171 (1968), and Tacoma v. Welcker, 65 Wn.2d 677, 399 P.2d 330 (1965).

28. There appears to be no decision of any court in the United States, prior to *Wandermere,* which has decided whether the requirement of judicial review of public use determination extends to damagings. It should be noted that even though the court indisputably has the final say on public use in the case of a taking, the legislature is not without power in this regard. The legislative declaration of public use is binding on the court unless it is arbitrary or capricious. State *ex rel.* Lange v. Superior Court, 61 Wn.2d 153, 377 P.2d 425 (1963).

there is a damaging.[29] This rule could have undesirable effects. For example, if the state legislature were to authorize the opening of a garbage dump wholly on state owned land, no public use hearing would be held (assuming no zoning problems) if no private property were taken. Although the odors from the dump might lower the values of neighboring property, if the injury caused did not constitute a taking, but was only a damaging, compensation would be paid, but no hearing on public use would be held. If a hearing were held the property owners might overcome the presumption of public use by showing that the dump was unreasonbly located, and the court would order the dump closed. Yet, without such a hearing, a project which was not for a public use would be allowed to continue. In view of the role of the judiciary in the determination of public use, the supreme court's response should have been that the judiciary has the final judgment on what constitutes public use for taking or damaging.[30]

The court did, however, state that although a judicial determination of public use is not required when there is a damaging, the state, when sued, cannot proceed with construction "until such time as petitioner's damages [have] been ascertained and paid."[31] A possible consequence of this ruling will be that property owners who otherwise might have to suffer damages without compensation will now be compensated. This result will obtain because the condemnor, knowing that damaged property owners can enjoin a project until damages are paid, will probably want to include more individuals in initial formal condemnation proceedings in order to avoid expensive piecemeal litigation and adverse publicity. Hence, each additional damaged property

29. *Wandermere,* 79 Wn.2d at 693, 488 P.2d at 1092.

30. There is textual support in the constitution for the court's position. The clause dealing with the judicial determination of public use is modified only by "taking" and not by "damaging." The Washington constitution provides:

> Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

WASH. CONST. art. 1 § 16.

31. *Wandermere,* 79 Wn.2d at 696, 488 P.2d at 1093. The court rejected the "balancing of equities" doctrine which the lower court used to deny the injunction. This was quite proper since the question is one of rights, not of damages. American Tel. & Tel. Co. v. Smith, 71 Md. 535, 18 A. 910 (1889). Hence, the payment of damages is a condition precedent to the right of the public to damage property. Geurkink v. City of Petaluma, 112 Cal. 306, 44 P. 570 (1896). WASH. CONST. art. I, § 16 provides: "No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner. . . ."

owner included in the initial procedings will be spared the expense of bringing an inverse condemnation suit. Moreover, some property owners who otherwise would be unable to afford a suit or who were unaware of their rights will be compensated.

It has been argued by some that such a liberal policy of compensating property owners for damages will bring all public projects to a halt.[32] Such pessimism is supportable neither in logic nor in fact.[33] First, in many cases the state will choose to formally condemn, thus avoiding injunctive proceedings. Second, not many damage suits will be brought by property owners because of the expense involved.[34] In addition, it would seem that even if some law suits are brought, the public interest is best served by a liberal compensation policy. As the court in *Martin* said: "Surely the protection of the public interest does not entail the refusal of *small* claims on the ground that the burden to the public is not great enough to pay for!"[35] To be sure, more money may have to be spent, but whatever that sum is, it is evidently more equitable to apportion it on the property of the greater number who benefit than upon the few who have sustained the damage.[36]

Even if damage suits are brought, however, a procedure can be developed which will enable the condemnor to continue with its project and avoid the issuance of a preliminary injunction. Justice Finley, who wrote both the *Martin* and *Wandermere* opinions, suggested in his concurring opinion in *State ex rel. Eastvold v. Yelle*[37] how the condemnor could satisfy due process and still avoid the injunction. Coupled with some additional recommendations, the formula would be as follows. At the hearing for the preliminary injunction the court would adjudicate both the question of public use and the probable

32. *See* Spater, *supra* note 11; People *ex rel.* Dept. of Public Works v. Symons, 54 Cal. 2d 855, 357 P. 2d 451, 9 Cal. Rptr. 363 (1960); Northcutt v. State Road Dept., 209 So. 2d 710 (Ct. App. Fla. 1968).

33. Nebraska has had such a policy for 80 years, and nobody has charged that public projects in that state have been unduly impeded. Washington has lived under the liberal rule of *Martin* for 8 years without complaint. Moreover, if the costs exceed the benefits, the project probably should not be done at all. F. HAYEK, THE CONSTITUTION OF LIBERTY 351 (1960).

34. The provision in WASH. REV. CODE § 8.25.070 (1967) regarding expert witness and attorney's fees does not go into effect until a condemnation action has begun. Hence, the property owner must absorb all costs of obtaining a preliminary injunction.

35. 64 Wn.2d at 319-320, 391 P.2d at 547.

36. *See* Harmon v. City of Omaha, 17 Neb. 548, 23 N.W. 503, 504 (1885).

37. 46 Wn.2d 166, 279 P.2d 645 (1955).

amount of damages.[38] As a condition of not issuing the injunction, assuming there is both damage and public use, the court could require that the condemnor pay into court in cash[39] a sum twice the amount of damages arrived at by the court.[40] In that way the project could continue, and the property owner would be protected. At a later date a jury could make the final determination on damages as it can now.[41]

Due process would be satisfied by the above procedure. By requiring a cash deposit, there is no problem of future nonpayment as there may be with a bond or a warrant. Since the amount of damage is initially determined by the court and not the condemnor or condemnee, neither party is prejudiced. The chances are miniscule that any eventual award as determined by a jury would be more than double the court's estimate. Again, it would in most, if not all, cases be less expensive for the state to pay cash to the court immediately rather than be enjoined for any period of time from working on the project. An injunction would only follow if no public use were found or if there were no compensation made in advance.

The net effect of the *Wandermere* decision should be the adoption of a more realistic system of cost accounting for public projects. Public agencies will need to consider the degree of harm occasioned to those who are hurt by the contemplated project, as well as the benefit which would flow to the public. If a freeway, highway or any public improvement is planned, the damage to people's property will be a cost

38. While an adjudication of public use and necessity and of damages at the same time might well be inconvenient, it would certainly be efficient, and there is nothing in current law to prohibit such a combination. *See* WASH. REV. CODE 8.04.070 (1959), on the hearing of public use and necessity and WASH. CIV. R. SUPER. CT. 65. on the hearing for a preliminary injunction.

39. Simply giving a bond into court has been declared unconstitutional, since it does not satisfy the requirement of prepayment. State *ex rel.* Smith v. Superior Court, 26 Wash. 278, 66 P. 385 (1901). Warrants may not survive a constitutional attack either, since they are a promise to pay from the treasury, which may or may not at the time of presentation of the warrant have any money. *Cf.* WASH. REV. CODE § 47.12.230 (1969), on issuance of warrants and their payment. Arizona has a well-drafted statute providing that double the estimated damages be paid into court. ARIZ. REV. STAT. ANN. § 12-1116 (1956). Alabama has a constitutional requirement, similar to Arizona's statute, which applies to counties and other corporations and individuals, but not to the state. ALA. CONST. art. 14, § 235.

40. The legislature would probably have to pass legislation enacting the "double damage" provision since a court would seem to have no power on its own to compel such payment.

41. *See, e.g.*, WASH. REV. CODE § 8.04.092 (1959). A jury determination of damages can be waived by consent of all the parties.

factor in deciding whether to go ahead with a particular project, or with one project instead of another. The agency decisions which should result from the inclusion of these factors will assuredly be more in the public interest than the planning of the past.