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APPROPRIATION OF PROPERTY—STATE AND MUNICIPAL CORPORATIONS MAY APPROPRIATE FUNDS TO COMPENSATE ABUTTING LANDOWNERS FOR RIGHTS OF NAVIGATION ON RIVER—CONSTRUCTION OF BRIDGE IMPAIRING RIGHTS OF NAVIGATION—JUST COMPENSATION FOR INJURY TO PROPERTY OF ABUTTING LANDOWNERS; ABUTTING PROPERTY OWNERS OWN BED OF RIVER SUBJECT TO RIGHTS OF NAVIGATION.

SYLLABUS:

1. State and municipal authorities engaged in a cooperative highway construction contract may legally pay damages to the owners of land abutting on a navigable river if the construction of a fixed type bridge obstructs or materially impedes the use of said river for the commerce for which it was adapted.

2. The owners of land abutting on a navigable river own the entire river subject only to the easement of navigation. If the state or city by a highway improvement obstruct or materially impede this easement of navigation for the commerce for which it was adapted, which results in a special damage to said owners, they are entitled to just compensation for the injury.

Columbus, Ohio, February 20, 1958

Hon. George J. Thornmyer, Acting Director of Highways
Department of Highways, Columbus, Ohio

Dear Sir:

Your request for my opinion reads, in part, as follows:

“The department of highways and the City of Toledo have entered into a cooperative agreement relative to the construction of the Toledo Expressway which said project has been approved by the Bureau of Public Roads as a part of the Interstate System.

To construct said project it will be necessary to construct a new bridge over the Maumee River which is navigable. However, the proposed site is upstream from the presently dredged channel and turning basin. Under the federal law it is required that the Corps of U. S. Army Engineers approve the plans before such a bridge may be constructed . . .

The City of Toledo has proposed the construction of the fixed type of bridge . . . and requested the approval from the

Corps of Engineers. The Corps of Engineers conducted a hearing upon the proposal . . .

At the hearing it develops that the A. Elevator Company is actually using the said waterway by using a private channel from the dredged channel upstream to their place of business and considerable damage to it would result if the fixed bridge were constructed as requested.

As to the remaining objectors to the low level bridge, it appeared that their claims were based upon potential future development of the St. Lawrence Seaway. However, all of said objectors own land that abut upon the river and have operating businesses and the W. Railroad Company own the land upon which the business of the A. Elevator is operated and have use of the private channel.

In view of the premises, please advise whether the state and the city may legally pay said damages.

Also your opinion is requested as to the legal rights of the other protestants. In other words if the A. Elevator Company withdraws its objection by reason of the damage settlement and a permit is granted may the other protestants make claims or enjoin the construction unless settlements are made."

Your request states that the river over which the bridge will be built is navigable. The facts as stated present the following legal question. What rights do owners of land abutting on a navigable river have?

Navigable rivers in Ohio, to the extent that they are in fact navigable, are public highways, and their character as highways is determined by their navigable capacity rather than by the frequency of their use for navigation. 41 Ohio Jurisprudence, 81.

From the facts presented in your request, I will assume the property owners in question abut upon the part of the Maumee River that is navigable.

The rights of abutting owners of a navigable river was decided early in our history by the case of *Walker v. Board of Public Works*, 16 Ohio, 540. The court stated the rule as follows, page 544, 545:

"He who owns the land in both banks of such river owns the entire river, subject only to the easement of navigation, and he who owns the land upon one bank only, owns to the middle of the main channel, subject to the same easement. The right of the public is merely the right to use the water within the channel for the purposes of navigation. The proprietor of the lands upon

its banks may use the waters of the river in any way not inconsistent with the public easement, or of private rights, and neither the state nor any individual has the right to divert the water to his injury. The right of the adjacent proprietor to the water of the stream is a usufructory right, appurtenant to the freehold, not an absolute property. Hence, the state, in its exercise of the right of eminent domain, can subject the waters of such stream to other public uses the same as any other private property, by making a just compensation for the injury and not otherwise."

The leading case in Ohio on this subject is *Hickok v. Hine*, 23 Ohio St., 523. It was stated at page 528 in the opinion:

"The obstruction of the navigation of the river at the point contemplated would work a special damage to the plaintiff below for it appears that he is the owner of the river above the proposed bridge and that there were upon his premises a landing and warehouse, which were more or less profitably used in connection with the navigation of the river when it was not obstructed. This was a use of the river at that place, to which he was not entitled above that enjoyed by the public; for the public right was that of an easement merely in the waters of the river for the purposes of navigation.

The value of this private use of the river, in connection with the landing and warehouse at the point in question, as well as that of the landing and warehouse themselves, depends upon the extent of commerce that may be carried on to and from that point, and it may vary with the changing circumstances of the country. Nevertheless, whatever such values may be, the right remains as the private property of the owner of the land, and the destruction of navigation to that point would render this right valueless, and, therefore, would be to his damage of a special and substantial character."

Besides the right of the State in its exercise of the right or eminent domain to subject the waters of navigable streams as set forth in the case of *Walker v. Board of Public Works, supra*, it was stated in the case of *State ex. rel. Humphrey v. The Lake Shore & Michigan Southern Railway Co.*, 24 O.C.C. (N.S.), 432, at page 440:

"It has been the law, and is today, that no one has a right to obstruct or materially impede the use of navigable waters for the commerce for which they are adapted."

Therefore, it must be first determined if the building of the fixed type bridge would obstruct or materially impede the use of the navigable stream for the commerce for which it is adapted.

In specific answer to your questions you are advised that:

1. State and municipal authorities engaged in a cooperative highway construction contract may legally pay damages to the owners of land abutting on a navigable river if the construction of a fixed type bridge obstructs or materially impedes the use of said river for the commerce for which it is adapted.

2. The owners of land abutting on a navigable river own the entire river subject only to the easement of navigation. If the state or city by a highway improvement obstruct or materially impede this easement of navigation for the commerce for which it was adapted, which results in a special damage to said owners, they are entitled to just compensation for the injury.

Respectfully,
WILLIAM SAXBE
Attorney General