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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

REGENCY OUTDOOR ADVERTISING, INC., Plaintiff and Appellant, v. CITY OF LOS ANGELES et al., Defendants and Respondents.	B159255 (Los Angeles County Super. Ct. No. YC037625)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jean E. Matusinka, Judge. Affirmed.

Berger & Norton; Manatt, Phelps & Phillips, LLP, Michael M. Berger and Edward G. Burg for Plaintiff and Appellant.

Rockard J. Delgadillo, City Attorney, Eduardo A. Angeles, Managing Assistant City Attorney and D. Timothy Daze, Deputy City Attorney for Defendants and Respondents.

Regency Outdoor Advertising, Inc. appeals from judgment against it in this inverse condemnation action against the City of Los Angeles, the City's Department of Airports, and the Department's Board of Commissioners (collectively City). We conclude that although the trial court erred in its statement of the applicable law, it nevertheless reached the correct conclusion that the partial obstruction of Regency's billboards by City's planting of palm trees is not compensable under the California Constitution. We affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

In June 2000, the City planted palm trees and placed lighted pylons on the Century Boulevard approach to Los Angeles International Airport as part of an LAX enhancement project. Regency, which owns several billboards in that area, claimed the palm trees on the north side of the street and in the median obstruct the visibility of six of its billboard facings. It brought this action against the City, seeking compensation for lost value.

Summary adjudication was entered against Regency on its cause of action for breach of contract. After a bench trial on the remaining cause of action for inverse condemnation, the court found that any loss of visibility was not compensable. It also found Regency had failed to prove damages. The court awarded costs to City, including expert witness fees. Regency appeals from the judgment.

DISCUSSION

I

Article I, section 19 of the California Constitution requires payment of just compensation when private property is "taken or damaged for public use . . . ." The words "or damaged" were added to the Constitution in 1879 "to clarify that application of the just compensation provision is not limited to physical invasions of property taken for 'public use' in eminent domain, but also encompasses special and direct damage to adjacent property resulting from the construction of public improvements." (*Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368, 379-380.) Property is "taken or

damaged" within the meaning of the California Constitution when "(1) the property has been physically invaded in a tangible manner; (2) no physical invasion has occurred, but the property has been physically damaged; or (3) an intangible intrusion onto the property has occurred which has caused no damage to the property but places a burden on the property that is direct, substantial, and peculiar to the property itself." (*Oliver v. AT&T Wireless Services* (1999) 76 Cal.App.4th 521, 530; *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 940.)

Not all damaging interferences with property rights are actionable, and "a determination must be made as to whether there is an 'actionable interference' with a property right; or, to use another term, 'substantial impairment.'" (*United Cal. Bank v. People ex rel. Dept. Pub. Wks.* (1969) 1 Cal.App.3d 1, 6.) Recovery by neighboring landowners in an inverse condemnation action "requires more than a showing that the value of the property has diminished as a result of the project: Such landowners must establish that the consequences of the project are 'not far removed' from a direct physical intrusion or amount to a nuisance . . . , or that the project results in actual physical injury to the property, as opposed to mere diminution in its enjoyment . . . ." (*Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp*. (1997) 16 Cal.4th 694, 713-714.)

Whether this public project constituted a taking of Regency's property is a mixed question of law and fact. (*Ali v. City of Los Angeles* (1999) 77 Cal.App.4th 246, 250.) "Mixed questions of law and fact involve three steps: (1) the determination of the historical facts -- what happened; (2) selection of the applicable legal principles; and (3) application of those legal principles to the facts. The first step involves factual questions exclusively for the trial court to determine; these are subject to substantial evidence review; . . . [T]he second and third steps involve questions of law for our de novo review." (*Ibid*.)

In this case, the historical facts are not in dispute. Regency's challenge is to the legal principles relied on by the court and the court's application of those principles to the facts. Thus we are presented with legal issues, subject to our de novo review.

We agree with Regency that the trial court applied an erroneous legal principle in finding that "Loss of visibility is not compensable where the loss is caused by the construction of a public improvement on land not taken from the landowner . . . ." This finding was based on the holding of *People v. Symons* (1960) 54 Cal.2d 855. In *Symons*, property immediately adjacent to a single family home was condemned for construction of the San Diego Freeway. After condemnation, a street was terminated at the freeway boundary adjoining the owners' property. In addition to the condemnation of property for construction of the freeway, a 440 square foot portion of the owners' property was taken to make the termination of the street into a cul-de-sac. The owners sought to introduce evidence that the value of their property had decreased because of "the change from a quiet residential area, loss of privacy, loss of view to the east, noise, fumes and dust from the freeway, loss of access over the area now occupied by the freeway, and misorientation of the house on its lot after the freeway construction." (*Id*. at p. 858.) The trial court excluded this evidence because it related to noncompensable items of severance damage.

The Supreme Court first noted the existence of established law "that when a public improvement is made on property adjoining that of one who claims to be damaged by such general factors as change of neighborhood, noise, dust, change of view, diminished access and other factors similar to the damages claimed in the instant case, there can be no recovery where there has been no actual taking or severance of the claimant's property. [Citations.] Accordingly, in the case at bar, had the parcel for the cul-de-sac not been taken, the defendant would not be entitled to recovery based on the general diminished property values due to the construction of the freeway on adjoining property. It is manifest, then, that the crucial question here is whether the defendants, whose property was taken for purposes other than the construction of the freeway itself, are entitled to compensation, as severance damages, for those impediments to the property resulting from the objectionable features caused by the maintenance and operation of the freeway proper on lands other than those taken from the defendants." (*People v. Symons*, *supra*, 54 Cal.2d at p. 860.) The court answered in the negative, explaining that the state

Constitution did not authorize a recovery "where there would be no recovery for damages caused by the construction of an improvement if undertaken by a private citizen on adjoining property." The court held that the owners' attempt to enlarge the scope of recovery to include damages based on improvements constructed on adjoining land "would impose a severe burden on the public treasury and, in effect, place 'an embargo upon the creation of new and desirable roads.'" (*Id*. at pp. 861-862.)

The law of eminent domain was substantially revised in 1975, and Code of Civil Procedure section 1263.420[1] was added. It provides: "Damage to the remainder is the damage, if any, caused to the remainder by either or both of the following: [¶] (a) The severance of the remainder from the part taken. [¶] (b) The construction and use of the project for which the property is taken in the manner proposed by the plaintiff whether or not the damage is caused by a portion of the project located on the part taken." The Law Revision Commission Comment to section 1263.420 explains: "Prior law was not clear whether damage to the remainder caused by the construction and use of the project were recoverable if the damage-causing portion of the project was not located on the property from which the remainder was severed. Compare *People v. Symons*, 54 Cal.2d 855, 357 P.2d 451, 9 Cal.Rptr. 363 (1960), with *People v. Ramos*, 1 Cal.3d 261, 460 P.2d 992, 81 Cal.Rptr. 792 (1969), and *People v. Volunteers of America*, 21 Cal.App.3d 111, 98 Cal.Rptr. 423 (1971). Subdivision (b) abrogates the rule in *Symons* by allowing recovery for damages to the remainder caused by the project regardless of the precise location of the damage-causing portion of the project if the damages are otherwise compensable."

In light of this revision to the law of eminent domain, the holding of *Symons* as to the location of the damage-causing portion of the project to the remainder of severed property is no longer the law. The trial court erred in finding loss of visibility would not be compensable based on the fact that the loss was caused by a public improvement

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[1] All statutory references are to the Code of Civil Procedure unless otherwise indicated.

constructed on land which was not taken from Regency.[2] But applying the correct law to the historical facts in this case, we reach the same ultimate conclusion the trial court reached -- the impairment of visibility of Regency's Century Boulevard billboards was not an actionable interference with Regency's property rights.

Regency cites several cases recognizing a landowner's right to visibility of property. But as we shall explain, none of them finds an actionable impairment based on loss of visibility alone.

Williams v. Los Angeles Ry. Co. (1907) 150 Cal. 592 was not an eminent domain or inverse condemnation case. The plaintiff owned a building at the intersection of Fourth and Spring Streets in Los Angeles. He placed signs advertising his retail curio business on this building, where they could be seen from the street. The defendant operated an electric street railway. It erected a large iron post at this intersection, upon which it placed a switch tower approximately nine feet from the walls and windows of plaintiff's building. Plaintiff sought a preliminary injunction to prevent this obstruction. The Supreme Court recognized that every property fronting on a street has certain private easements, including the right of ingress and egress to and from the lot over and by means of the adjacent portion of the street; the right to receive light and air from the space occupied by the street; and "[t]he right to have the street space kept open so that signs or goods displayed in and upon the lot may be seen by the passersby, in order that they may be attracted as customers to patronize the business carried on thereon." (150 Cal. at pp. 594-595.) Because of its location, the switching tower was, "to some extent an obstruction to the exercise of all of these easements. To the extent of the space occupied, it absolutely excluded all other use, either for passage, light, air, or view. Whether the damage and obstruction thereto was so slight as to come within the *de minimis* rule, or was sufficient to justify an injunction *pendente lite*, was a matter for the determination of the court below." (*Id.* at p. 595.) The Supreme Court found no abuse of

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[2] Section 1263.420 addresses the situation where there is a severance and a determination of remainder damages, a circumstance which did not occur in this case.

discretion in the trial court's denial of injunctive relief. (*Id*. at p. 597.) This case recognizes loss of visibility of advertising as a type of damage, but also recognizes that such damage may be *de minimis* depending on the facts.

Next on Regency's list is *People v. Ricciardi* (1943) 23 Cal.2d 390. This was a condemnation proceeding to acquire land for a grade separation of Rosemead Boulevard at its intersection with Ramona Boulevard. The defendants owned property at the northeast corner of Rosemead and Ramona, and were compensated for the portion of their property that was taken for the project. They also received severance damages. Before the project was undertaken, defendants had ingress and egress from both streets; if the project were constructed as planned, Rosemead Boulevard would pass under Ramona in a manner which would cut off defendant's property from the main stream of traffic, retaining direct access only to service roads. Defendants presented evidence of severance damages based on interference with access from their property to the main highway, and the loss of visibility from the highway. The plaintiff appealed the judgment based in part on the admissibility of this evidence. The Supreme Court affirmed, holding: "We recognize that the 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 and an easement of reasonable view of their property from such highway." (*Id*. at p. 399.) The court noted that "[t]he right of reasonable view in addition to the right of ingress and egress is named as one of the easements possessed by the abutting owner in *Williams v. Los Angeles Ry. Co.*[, *supra*,] 150 Cal. 592, 595 [89 P. 332]. Here again it was for the trial court to determine whether the obstruction caused by the underpass would unreasonably cut off defendants' property from visibility by travelers on the main highway, and, the right being substantially impaired, the amount of damage was a question for the jury." (23 Cal.2d at p. 404.) *Ricciardi* recognizes that loss of visibility, in addition to loss of direct access to the main highway, may constitute substantial impairment of property, but it does not hold that such a factor, on its own, is compensable.

People v. Loop (1954) 127 Cal.App.2d 786 was an eminent domain case with an issue about severance damages to defendants' property. The trial court refused to instruct the jury that defendants' right of access to and from Wilshire Boulevard and their easement of reasonable view of their property from Wilshire Boulevard would be substantially impaired by the taking of property, and that such deprivation was an element of severance damages. Relying on *People v. Ricciardi, supra*, the court held this was error: "The evidence is without conflict that defendants' right of ingress and egress to and from Wilshire Boulevard and their easement of reasonable view will be substantially impaired by the taking of parcel 5. The jury should have been told it should consider the deprivation of the right of access and the easement of reasonable view in assessing severance damages." (*Id*. at p. 804.) This case does not support the claim that a mere obstruction of visibility, without more, constitutes a substantial impairment of property which is compensable.

Goycoolea v. City of Los Angeles (1962) 207 Cal.App.2d 729 is similarly distinguishable. Plaintiff owned property on Castelar Street, between Sunset Boulevard and Ord Street. The city constructed a viaduct across Sunset Boulevard, connecting with Hill Street to the south. The viaduct was connected to Castelar Street by a ramp of earth, and the embankment of the viaduct opposite plaintiff's property was 10 to 13 feet above the grade of the portion of Castelar Street still remaining in front of plaintiff's property. Castelar had been the direct connection to the Pasadena Freeway north of plaintiff's property, but the construction of the viaduct caused the remaining portion of Castelar to be a one-way street proceeding south. The trial court found this constituted a substantial impairment of plaintiff's right of access, and the Court of Appeal found the evidence supported that finding. "Where there is evidence to support a finding that substantial and unreasonable interference with the landowner's easement of access or right of ingress and egress has been caused as the result of a change in the street on which his property abuts, an appellate court will not say as a matter of law that such finding is erroneous." (*Id*. at p. 735.)

The court then addressed the other findings of the trial court. "With respect to the street in front of his land, an abutting owner has an easement of light and air. [Citations.] He has also an easement of reasonable view of his property from the street or highway. [Citations.] While the interference with the easement of light and air caused in the present case by the embankment does not appear to have been of the magnitude of that evident in *Anderlik v. Iowa State Highway Com.*, 240 Iowa 919 [38 N.W.2d 605], it cannot be said that the evidence of that interference was of such an insignificant nature that the city suffered prejudice requiring a reversal of the judgment because of the finding that the plaintiff's property has been 'substantially deprived' of light and air. With respect to the easement of reasonable view of the property from the public street, it was for the trial court to determine whether the embankment has unreasonably diminished the visibility of the plaintiff's property, insofar as travelers on the elevated portion of the thoroughfare are concerned, so as to cause a substantial impairment of that right." (*Goycoolea v. City of Los Angeles, supra*, 207 Cal.App.2d at pp. 735-736.) Loss of visibility because of the embankment was properly taken into consideration; it did not, in itself, establish that there was substantial damage to plaintiff's property from the public improvement.

Finally, in *United Cal. Bank v. People ex rel. Dept. Pub. Wks., supra*, 1 Cal.App.3d 1, the owner of a retail department store in Pomona brought an inverse condemnation suit against the Department of Public Works. The Department had commissioned work that closed First Street where it abutted respondent's store, relocated First Street to the north, required southbound vehicles intending to visit respondent's store to use an up-curving ramp to turn into new First Street and into a new parking lot, and impaired the view of the westerly side of the store including its display windows. (*Id*. at p. 7.) The trial court found, and the Court of Appeal agreed, that this constituted substantial, actionable impairment of respondent's easement of access: "Here, Garey Avenue in front of the store was not closed, only lowered in level and separated by a guardrail from the sidewalk making it unusable as a place for store customers to board and alight from vehicles. From the north, a southbound traveler's view of the store was

impaired by the underpass, reducing the store's visibility impact. The relocation of First Street was not merely a diversion of traffic away from the north side of the store by the creation of a new street where none previously existed; old First Street was closed off from Garey Avenue and became part of a parking lot. The combination of appellant's several works of improvement thus effectually interfered with respondent's rights of access and exposure. No mere rerouting of traffic is involved; rather, a substantial change in the streets themselves as they relate to respondent's property. We hold actionable interference was established." (*Id*. at p. 8.) Again, the public work of improvement which was deemed a substantial impairment involved far more than mere partial obstruction of the visibility of the property from the street; the loss of visibility was just a related consequence of the project.

Some decisions describe the easement of reasonable view as separate from the right of ingress and egress (see *People ex rel. Dept of Public Works v. Stevenson & Co.* (1961) 190 Cal.App.2d 103, 107), but none has found substantial impairment of property rights based solely on loss of visibility. Since the only claimed damage in this case was the impairment of visibility of Regency's billboards, we find no error in the trial court's conclusion that there was no substantial or actionable impairment of Regency's property rights.

This conclusion follows logically from the established law that there is no obligation to compensate a landowner for diminution of property value resulting from highway changes which do not interfere with access, but cause diversion of traffic or circuitry of travel beyond an intersecting street. (See *Goycoolea v. City of Los Angeles*, *supra*, 207 Cal.App.2d 729, 737.) If reduction of a business's value caused by the rerouting of traffic is not compensable, then there is no reason to reach a different conclusion where the routing remains the same, but the visibility of the business is changed by the planting of trees.

Regency argues this result allows City to evade the requirements of the Outdoor Advertising Act (Bus. & Prof. Code, § 5200 et seq.) where it blocks visibility of a billboard, even though it would have to compensate the owner if it required outright

removal of the sign. Business and Professions Code section 5412 provides: "Notwithstanding any other provision of this chapter, no advertising display which was lawfully erected anywhere within this state shall be compelled to be removed, nor shall its customary maintenance or use be limited, whether or not the removal or limitation is pursuant to or because of this chapter or any other law, ordinance, or regulation of any governmental entity, without payment of compensation, as defined in the Eminent Domain Law . . . ." Regency is correct -- the statute addresses removal, or interference with use or maintenance, not impairment of visibility. Since City did not require removal of the signs, or limit their use or maintenance, it had no statutory obligation to compensate Regency.

II

Regency also challenges the court's finding that it failed to prove that loss of visibility, if any, decreased the market value of its property. Having concluded that the court properly found there was no substantial impairment for which compensation was owed, we do not reach the question of damages.

III

Regency claims the court erred in awarding the City costs under section 998. On November 20, 2001, City made a statutory offer to compromise pursuant to section 998. In settlement of the case, City would pay Regency $1,000 and remove one of the trees at the intersection of Century and Sepulveda Boulevard. Regency did not accept the offer, and after City prevailed at trial, it filed a cost bill seeking $104,145 in costs, including $83,295 in expert witness fees it claimed were recoverable under section 998. Regency argues the award should not have included any expert fees incurred before the date of the statutory offer. We disagree.

Section 998, subdivision (c)(1) provides: "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to

cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant."[3]

The first portion of section 998, subdivision (c)(1) refers to "costs from the time of the offer." Items allowable as costs are set out in section 1033.5, subdivision (a). Items not allowable as costs are set out in subdivision (b), including "(1) Fees of experts not ordered by the court." Reading the two statutes together, it is evident that the reference to "costs" in the first sentence of section 998 does not include expert fees.

The second sentence of section 998, subdivision (c)(1) addresses the recovery of expert witness fees, providing that the court, "in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses . . . ." While costs recoverable under the first sentence of the subdivision are expressly limited to "costs from the time of the offer," there is no similar limitation on the court's discretion to award costs to cover the services of expert witnesses under the second sentence. Regency has not demonstrated an abuse of this discretion in the trial court's award of expert costs, and we therefore find no basis for reversal.

Regency also claims the City is not entitled to postoffer expert costs because its offer was not reasonable or made in good faith. "Whether a section 998 offer was reasonable and made in good faith is left to the sound discretion of the trial court." (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 134.) Where the offering party prevails in the action, its 998 offer is presumed to have been reasonable and it is the rejecting party's burden to show otherwise. (*Ibid*.) While City's monetary offer was small, it prevailed on all claims, supporting the presumption that its offer was reasonable. Regency has failed to show otherwise, and we therefore find no abuse of discretion in the court's award of costs.

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[3] The exclusion of eminent domain actions from this provision has been held not to apply to inverse condemnation actions. (*Goebel v. City of Santa Barbara* (2001) 92 Cal.App.4th 549, 558-559.)

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

EPSTEIN, P.J.

We concur:

HASTINGS, J.

CURRY, J.