

# Construction Impacts From Public Project Are Not "Quality Of Life" General Damages, But Takings Requiring Compensation

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**August 5, 2020**

The Louisiana Court of Appeal's opinion in *Lowenburg v. Sewerage & Water Board of New Orleans*, No. 2019-CA-0524 (July 29, 2020) is long (54 pages) and detailed. But for those of you interested in inverse condemnation liability stemming from the impacts on property owners from public construction projects, this is your case.

This consolidated appeal involves a group of homeowners, Plaintiffs-Appellees ("Lowenburg Appellees") and a non-profit church with a daycare center Plaintiff-Appellee, Watson Memorial Spiritual Temple of Christ d/b/a Watson Memorial Teaching Ministries, ("Watson Appellee") who claim that they, along with their properties, sustained various types of damages as a result of the construction of the Southeast Louisiana Urban Drainage Project (SELA Project). This federally sponsored and funded project involved the construction of multiple drainage canals and was carried out by the United States Army Corps of Engineers ("USACE") and Defendant-Appellant, Sewerage and Water Board ("Appellant").

Slip op. at 1-2 (footnotes omitted).

The owners sought compensation for things like lost and restricted access, excessive vibrations, noise, dust, dirt, debris, and "foul odors" that resulted in physical damages, and lost income and profits. After a trial, the court entered judgment for the owners that the construction had inversely condemned their property, and entered damage and compensation awards.

The Board appealed, raising a whopping 9 points of error. The owners cross-appealed, arguing that they were entitled to greater damages, plus interest and attorneys' fees on appeal.

We're not going to go through the details on how the court disposed of each of the Board's arguments. But the first part of the short story is that the court of appeal held that the damages suffered by the plaintiffs -- loss of use and enjoyment for day and night noise, vibration, dust, loss of parking, and property damages -- are not "quality of life" problems (as the Board characterized them) that may be considered general damages. Slip op. at 8. After all, the Board argued, the plaintiffs' "homes were never rendered uninhabitable and use was never lost." Slip op. at 9.

The court rejected that argument, concluding instead that these impacts damaged the owners' use and enjoyment of their properties, including their property right to street access. *See* slip op. at 12-13. That was enough.

The second part of the short version is that the plaintiffs' proof of damages was just fine. Jump to page 21 of the slip opinion for the court's run down of how each owner proved damages and compensation. Especially interesting is the part where the court analyzes how to prove loss of use and enjoyment (slip op. 24-33), and loss of access and parking (slip op. 34-39).

Finally, the court cleaned up what looks like a typographical error in the trial court's damage judgment, and held that the owners are entitled to interest and attorneys' fees on appeal. Overall, we'd say this was a pretty resounding win for the property owners.

On that, we send felicitations to our Owners' Counsel of America colleague Randy Smith and his trial and appellate team. This one shows why they're the pros.

*Lowenburg v. Sewerage & Water Board of New Orleans*, No. 2019-CA-0524 (La. App. July 29, 2020)

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devoted to recent developments and commentary on **regulatory takings, eminent domain, inverse condemnation, property rights, land use law**, and (occasionally) **election law**.

## Author

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