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COURT OF APPEALS

STATE OF NEW YORK

ISLAND PARK, LLC,

Appellant,

-against-

No. 132

STATE OF NEW YORK,

Respondent.

20 Eagle Street
Albany, New York 12207
May 30, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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David Rutt
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 132, Island Park.

2 Counselor, would you like any rebuttal time?

3 MR. NAUGHTON: Two minutes, please.

4 CHIEF JUDGE LIPPMAN: Two minutes. Sure. Go
5 ahead. You're on.

6 MR. NAUGHTON: Michael Naughton on behalf of
7 appellant, Island Park.

8 CHIEF JUDGE LIPPMAN: Yeah.

9 MR. NAUGHTON: Our position is that the statute,
10 Section 97(5), imposes an obligation on the State to
11 compensate private landowners whenever - - -

12 CHIEF JUDGE LIPPMAN: What if it's a safety - -
13 - you know, one of the arguments is it's a safety matter,
14 for the safety of the public, you know, you can't have
15 these crossings or whatever you call them.

16 MR. NAUGHTON: There's no question - - -

17 CHIEF JUDGE LIPPMAN: Why - - - why isn't that
18 an argument against compensation?

19 MR. NAUGHTON: There's no question that every
20 crossing, according to the FRA and the DOT officials who
21 testified at the hearing, every crossing is dangerous and
22 therefore - - -

23 CHIEF JUDGE LIPPMAN: No, but what about with
24 the - - - they're going to put high-speed trains? It's -
25 - - it implicates a real safety issue. Does that really -

1 - - if that's the reason, do you still get compensation?

2 MR. NAUGHTON: Yes.

3 CHIEF JUDGE LIPPMAN: Why?

4 MR. NAUGHTON: So - - -

5 CHIEF JUDGE LIPPMAN: Why do you still get
6 compensation?

7 MR. NAUGHTON: Because it's to benefit the
8 society in general, and therefore, the individual should
9 not have all of the - - - bear all of the responsibility
10 and cost of that.

11 CHIEF JUDGE LIPPMAN: Even if you can still make
12 a profit and run your business even without the crossing,
13 you still get compensation?

14 MR. NAUGHTON: I think - - -

15 CHIEF JUDGE LIPPMAN: They're not - - - let's
16 assume they're not destroying your business.

17 MR. NAUGHTON: If they're not destroying it
18 completely, I think there's a question of fact as to what
19 the damages were and - - -

20 JUDGE SMITH: You - - - you don't claim they are
21 destroying it completely, do you?

22 MR. NAUGHTON: I do not claim that.

23 JUDGE READ: Yeah, you still have access,
24 correct?

25 MR. NAUGHTON: We still have access.

1 JUDGE READ: This piece of property hasn't
2 somehow been isolated by the loss of the easement.

3 MR. NAUGHTON: That's correct.

4 JUDGE GRAFFEO: You're - - - you're complaining
5 because you've got to go so many miles around this - - -

6 MR. NAUGHTON: Very circuitous access - - -

7 JUDGE GRAFFEO: - - - to get there.

8 MR. NAUGHTON: - - - at this point.

9 JUDGE RIVERA: But you are claiming - - -

10 JUDGE GRAFFEO: But you're - - - you're still
11 able to use the land once you get there?

12 MR. NAUGHTON: We can use the land - - -

13 JUDGE RIVERA: But you are claiming that it's an
14 actual physical taking of the "easement" which they say is
15 a corporeal interest.

16 MR. NAUGHTON: It starts with the physical
17 taking of the easement which is private property.

18 JUDGE RIVERA: So it sounds like it's two
19 different claims to me. You're claiming the easement's
20 been taken, that's a physical taking, and there's a
21 diminishment in the value of the rest of the property
22 because you've got to go around now.

23 MR. NAUGHTON: And then on top of that, the
24 consequential damages.

25 JUDGE READ: Which are what?

1 MR. NAUGHTON: So there's three elements of
2 damages which we never got to because we were talking
3 about liability.

4 JUDGE READ: Well, what would they be? What
5 would they be, in your view? What would the consequential
6 damages be?

7 MR. NAUGHTON: The consequential damages go to
8 the costs of operating this facility now that the - - -
9 it's been cut off, really - - -

10 JUDGE READ: So now what you have to take the
11 extra transportation, like extra gasoline or something
12 that you pay more - - -

13 MR. NAUGHTON: Gasoline, labor, time; time is
14 money.

15 JUDGE PIGOTT: In a condemnation case, that's
16 called severance damages, right? The value of the land is
17 less because you've been severed from your - - -

18 MR. NAUGHTON: That's correct.

19 JUDGE PIGOTT: - - - main one.

20 MR. NAUGHTON: That's correct or as
21 consequential - - - some of the cases talk about
22 consequential.

23 JUDGE READ: Well, why do you - - -

24 JUDGE GRAFFEO: Do we need to change our case
25 law to - - -

1 MR. NAUGHTON: I don't believe you do. I think
2 that we - - -

3 JUDGE GRAFFEO: This isn't - - - I mean, we - -
4 - we've pretty much said that where it's health and safety
5 there has to be a total economic loss. So are we going to
6 have to alter our rule? What - - - what rule are you
7 proposing that we apply here?

8 MR. NAUGHTON: Well, I think the first rule in
9 terms of - - - I think we all agree that it's the Penn
10 Central analysis that - - - that you would look at, and so
11 there's really no change in law; it's just how you would
12 look at those factors.

13 JUDGE ABDUS-SALAAM: Well, Penn Central involved
14 a regulatory taking. Is that what you're saying? I
15 thought you were claiming a taking per se.

16 MR. NAUGHTON: Well, we are; it's a de facto - -
17 - our - - - our position is that the - - - the first way
18 to look at this is that the statute itself requires - - -
19 because it gives the commissioner of DOT the power to
20 acquire through condemnation, it also has a concomitant
21 obligation to compensate landowners when it does take that
22 property.

23 JUDGE SMITH: But it wouldn't - - - isn't this
24 different from if the - - - if the State had said you've
25 got - - - we need to move our vehicles across your

1 property, we're condemning an easement. That - - - that
2 obviously would be entitled to get paid, but that's not
3 what happened here.

4 MR. NAUGHTON: No. What happened is that the
5 State had a plan to put a bridge and road there at Abele's
6 Crossing, and so the conversation began in 2004 at 50 Wolf
7 Road with DOT.

8 JUDGE SMITH: Yeah, but - - - they haven't built
9 a - - - you're not saying they built a road across your
10 property?

11 MR. NAUGHTON: They have not; however - - -

12 JUDGE SMITH: And if they had, there would be no
13 doubt you're entitled to be paid. But what they said was
14 you've got to shut down the crossing that's there.

15 MR. NAUGHTON: Right, because - - -

16 JUDGE GRAFFEO: So how - - - how - - - how do
17 you not fall under Birnbaum? That's - - - that's the case
18 I'm referring to in terms of do we have to change our
19 precedent.

20 MR. NAUGHTON: No, because this is not a broad
21 regulation - - -

22 JUDGE GRAFFEO: Penn Central - - - Penn Central
23 is a Supreme Court case.

24 MR. NAUGHTON: Right.

25 JUDGE GRAFFEO: So I'm looking at - - -

1 MR. NAUGHTON: That's correct.

2 JUDGE GRAFFEO: - - - our precedent, Birnbaum.

3 MR. NAUGHTON: This is not a broad regulation
4 where the State has said all private crossings have to be
5 closed on the Hudson Line because we want to put high-
6 speed rail there. Okay. That would be a harder case for
7 me. All right. This statute gives the State the power to
8 make ad hoc determinations to close certain crossings.
9 And the reason that they did it - - -

10 JUDGE GRAFFEO: And they made a fact-finding.
11 They said there were twenty-six trains a day, and some are
12 going 110 miles an hour - - -

13 MR. NAUGHTON: Correct.

14 JUDGE GRAFFEO: - - - and that there had been
15 several close calls because of the farm equipment on the
16 tracks.

17 MR. NAUGHTON: Correct. And the Appellate
18 Division found there was substantial evidence - - -

19 JUDGE GRAFFEO: Why is that not an exercise of
20 the State's police power?

21 MR. NAUGHTON: It - - - it's an ad hoc use of
22 it, and it wasn't the reason that they singled out Abele's
23 Crossing. Okay. So it goes to, under the Penn Central
24 analysis, the motive or character of the taking, and the
25 character of the taking was - - -

1 JUDGE SMITH: I - - - I thought it was - - - my
2 impression was that the reason that they had singled out
3 Abele's Crossing was that - - - now, you not only have a
4 crossing there, but you're bringing this heavy equipment
5 across it that is cumbersome and might get stuck and it
6 creates a real - - - a real collision hazard. If that - -
7 - if that's the reason, why doesn't that make it a police
8 power?

9 MR. NAUGHTON: That wasn't the reason. The
10 reason was they wanted to put a road and bridge there.
11 They had a hundred-page study taken that they
12 commissioned, and they said, we want a road and a bridge
13 there for unimpeded access.

14 JUDGE SMITH: So you're - - - you're saying the
15 safety - - - the safety concern is pretextual?

16 MR. NAUGHTON: It was; however, there were - - -

17 JUDGE SMITH: Can we make that judgment on - - -

18 MR. NAUGHTON: - - - they were able to make out
19 a case, no question.

20 JUDGE SMITH: How do we know that from this
21 record, that the safety was a pretext?

22 MR. NAUGHTON: Well, because Mr. Rosen, the head
23 of the department for DOT, who's in charge of this,
24 testified that they would not proceed. He said it was
25 inconceivable that they would proceed with this

1 road/bridge project without certainty that the - - - that
2 the crossing would be closed. Okay. He said the two go
3 hand in hand. And so the reason that they identified
4 Abele's Crossing for this treatment was because of the
5 road.

6 And you have to keep in mind that there are
7 three crossings within about a mile and a half, two miles
8 here. Just to the north is Teller's, which remains open;
9 just to the south is Stat's (ph.). They did not proceed
10 to close those other ones. They closed Abele's Crossing
11 because it was their hope that they would be able to
12 eliminate other crossings eventually by using this road
13 and bridge, but the bridge goes almost in the immediate
14 vicinity. And there are plans for it, and they've - - -
15 they've already served papers saying that they're going to
16 take four acres of Island Park's property, and that's in
17 the record.

18 JUDGE SMITH: But then - - - but if they do
19 that, they'll pay for it, of course.

20 MR. NAUGHTON: They will. But why leave out the
21 other segment of it which is, since it goes hand in hand,
22 why shouldn't the State also be responsible for closing
23 this crossing, which was integral to this 400-acre
24 operation?

25 JUDGE PIGOTT: Is the bridge going where the

1 crossing is?

2 MR. NAUGHTON: I'm sorry?

3 JUDGE PIGOTT: Is the bridge going where the
4 crossing was?

5 MR. NAUGHTON: Almost, right near - - - it's
6 right near it.

7 JUDGE PIGOTT: Is it in the - - -

8 MR. NAUGHTON: It's not right on it - - -

9 JUDGE PIGOTT: Okay.

10 MR. NAUGHTON: - - -but it's right next to it.
11 And it goes right across Island Park's fields.

12 JUDGE SMITH: Why - - - why is it necessary to
13 get rid of the crossing in order to build the bridge?

14 MR. NAUGHTON: It's DOT policy to do that.
15 That's all that they - - - they would - - - that's all
16 they would testify to.

17 JUDGE PIGOTT: One of the things Rosen said was
18 that he thought that CSX should bear the cost, I guess, of
19 this closure. I wasn't quite sure what he meant by that.
20 Does that mean he ought to be paying you? CSX ought to be
21 paying you?

22 MR. NAUGHTON: I think that that was in the
23 context, Your Honor, of when you have these hearings, the
24 question is presented whether to alter, close or
25 discontinue the crossing. So the State was not willing to

1 concede right up front that what their real goal was to
2 close the crossing. So they had to have testimony that
3 altering this crossing was not - - - was not an option.
4 And so what they really did is they altered it by having a
5 bridge go across, and that would be, you know, a grade
6 separation, they call that.

7 CHIEF JUDGE LIPPMAN: Okay, counsel - - -

8 JUDGE PIGOTT: CSX - - -

9 CHIEF JUDGE LIPPMAN: I'm sorry. Judge Pigott.

10 JUDGE PIGOTT: CSX doesn't owe you any money?
11 They're the ones that gave you the easement, aren't they?
12 I mean, their predecessor.

13 MR. NAUGHTON: No, they closed it because the
14 State order directed them to close it.

15 JUDGE PIGOTT: So they're just siding with this
16 group. Okay.

17 CHIEF JUDGE LIPPMAN: Okay, counselor.

18 MR. NAUGHTON: Thank you.

19 CHIEF JUDGE LIPPMAN: Thanks, counselor. You'll
20 have rebuttal.

21 Counsel.

22 MR. STORRS: Good afternoon, Your Honors, and
23 may it please the court. The closure order in this case
24 was not a taking under any theory, and claimant isn't
25 entitled to compensation.

1 CHIEF JUDGE LIPPMAN: Counsel, in view of the
2 statutory framework, doesn't it seem to - - - the intent
3 of the statute that they should be compensated? This
4 whole thing, to start with, was kind of to protect
5 farming, right? Isn't that - - - so - - - so why in that
6 context aren't they entitled to - - - to compensation if
7 you wanted to be consistent with the legislative intent?

8 MR. NAUGHTON: Well, the statute, Section 97,
9 was designed to provide authority to the commissioner to
10 close - - -

11 CHIEF JUDGE LIPPMAN: Yeah, I know.

12 MR. NAUGHTON: - - - crossings - - -

13 CHIEF JUDGE LIPPMAN: I know.

14 MR. NAUGHTON: - - - in Amtrak corridors because
15 they were potentially dangerous. And Section - - -

16 CHIEF JUDGE LIPPMAN: I know, but 52 - - - but
17 52, right, is there to - - - to protect farming,
18 basically, in some way, shape or form.

19 MR. STORRS: Well, even - - - even Section 52,
20 Your Honor, and its predecessors, there's an obligation on
21 the railroad to fence the tracks to keep livestock off the
22 tracks to prevent accidents. So even that has a safety
23 component. There's also - - -

24 CHIEF JUDGE LIPPMAN: Yeah, yeah. But I'm
25 talking about the general thrust of the - - - the statute,

1 doesn't it tilt towards giving them compensation when
2 they're - - - when they're - - - when you take away the
3 crossing?

4 MR. STORRS: Well, Section 97(5), which is what
5 counsel alluded to, authorizes the commissioner - - - it
6 doesn't mandate, but authorizes the commissioner to
7 acquire property rights that are necessary for the
8 purposes of this article.

9 JUDGE PIGOTT: You - - - you had an option. You
10 could - - - you could have bought it. You could have paid
11 for - - - you know, for what you took.

12 MR. STORRS: Well, there was no taking, Your
13 Honor, so there was nothing to pay for.

14 JUDGE PIGOTT: Well, they - - - they're missing
15 something, and you got it so - - -

16 MR. STORRS: There was no appropriation of this
17 crossing, Your Honor. It was - - -

18 JUDGE RIVERA: Well, if they no longer have an
19 easement, why didn't you just extinguish the easement?
20 Why isn't that a taking?

21 MR. STORRS: Because the - - - the closure, as a
22 regulatory act pursuant to the state's police power - - -

23 JUDGE PIGOTT: Well, let's - - - let's assume -
24 - - there's a lot of testimony about sight lines here, you
25 know, when the trains are coming and when they aren't and

1 who's going over. Let's assume for a minute that there's
2 a barn that's so - - - so close to the tracks that you, in
3 your - - - make a determination that it's obstructing the
4 views of people who are going to be crossing the tracks.
5 Can you order the barn to be taken down?

6 MR. STORRS: Is the barn on the - - - the
7 claimant's property? I - - -

8 JUDGE PIGOTT: Yeah.

9 MR. STORRS: Then I think it's - - - they could
10 probably order it to be taken down. I think that would be
11 a much different case in terms of whether there was a
12 taking of property at that point because arguably - - -

13 JUDGE SMITH: Well, if it - - - wait, wait. If
14 it's a safety hazard - - -

15 MR. STORRS: It's a safety hazard, and it's
16 possible that - - - that it could - - - it might, under
17 Penn Central, be treated as a regulatory taking, I think,
18 but it's a much different case from this case because
19 here, there hasn't been any physical invasion.

20 JUDGE PIGOTT: But stick with me. I - - - I'm
21 saying, you say take that barn down because you're
22 blocking the view of - - - of people who are looking - - -
23 worried about oncoming trains. And so he says, okay, I
24 will, but are you going to pay me for the barn? Are you
25 going to pay him for the barn?

1 MR. STORRS: I think that there's certainly an
2 argument under Birnbaum that payment is not required even
3 in a case like that.

4 JUDGE PIGOTT: So you say no.

5 JUDGE SMITH: Are there - - - are there cases
6 where - - - where a safety measure has been held, a
7 regulatory taking where remove - - - removal of - - -
8 something dangerous has been held to be a taking?

9 MR. STORRS: Your Honor, most of the cases I'm
10 familiar with go the other way, and - - - and at the
11 moment, I can't cite one where there was a - - - a
12 regulatory taking found in - - - in a safety context.

13 JUDGE PIGOTT: Could you have taken - - - could
14 you have taken a different route - - - you know, an
15 alternative saying, slow your trains down?

16 MR. STORRS: I think that was contrary to the
17 policy decision that had been made to try to increase the
18 speed of trains - - -

19 JUDGE PIGOTT: So you chose - - -

20 MR. STORRS: - - - throughout the corridor.

21 JUDGE PIGOTT: You chose one - - - you chose one
22 private business over another. You said, we - - - we like
23 the trains; we don't like the nursery. Nursery, you lose;
24 train, you win.

25 MR. STORRS: Your Honor, we didn't single out

1 anybody, and we didn't prefer railroads over nurseries.
2 What we - - - what we said was it was a policy judgment
3 made that in order to safely implement the high-speed rail
4 option that the State was committed to going forward with,
5 it was necessary to evaluate all the crossing - - - all
6 the private crossings, and that was the reason that
7 Section 97 and then Section 97(a) were enacted by the
8 legislature, to give the commissioner authority - - -

9 JUDGE PIGOTT: It was a given that there's going
10 to be high-speed trains. That was not an option to slow
11 them down.

12 MR. STORRS: I think that's - - - the policy
13 judgment had been made by all the interests in the
14 community and the State that high-speed rail was a
15 desirable option, and that created a need to take a close
16 look at the private rail crossings in the Amtrak and the
17 MTA corridors, certainly the Amtrak corridors especially,
18 but MTA - - -

19 JUDGE SMITH: What - - - what - - -

20 JUDGE GRAFFEO: You're not denying that they've
21 suffered an economic impact because of this? You're - - -
22 you're claiming that they're not entitled to any
23 compensation because of what they've - - -

24 MR. STORRS: That's correct, Your Honor.

25 JUDGE GRAFFEO: - - - what they've - - -

1 MR. STORRS: Diminution in economic - - -
2 economic impact or economic diminution value isn't - - -

3 JUDGE GRAFFEO: But could - - - could we change
4 that Birnbaum rule and not require that there be complete
5 - - - complete elimination of - - - you know, Birnbaum
6 basically says you have to lose total economic value.
7 Could we change that rule?

8 MR. STORRS: You can perhaps say that - - -

9 JUDGE GRAFFEO: Would it be that unfair to
10 change it? I guess that's my question.

11 MR. STORRS: Well, I think perhaps the question
12 is, fair to who? I mean, the government engages in
13 regulation all the time that has an impact on economic
14 value. And to require the government to have to pay every
15 time for the diminution in value that might result from
16 regulation would leave the government without the
17 resources to do much else.

18 JUDGE PIGOTT: The government did a very
19 thorough analysis, it seems to me, if you look at the
20 hearing as to all the options, you know, tunnel, I think,
21 and a bridge and the lights, and they found that they - -
22 - they wouldn't work. But the argument here this morning
23 is that - - - or this afternoon is that you are going to
24 build a bridge. Why wouldn't you leave this until you got
25 the bridge done, because I think there was some allusion

1 to the fact you may never get that bridge done. They're
2 cynical.

3 MR. STORRS: To my knowledge, the bridge is - -
4 - is still at the very beginning stages, and - - - and
5 there's no funding for it. But the DOT never said that
6 they wouldn't get rid of the crossing unless they built a
7 bridge. The quote was the other way. You know, we
8 wouldn't build a bridge without getting rid of the
9 crossings, too. That's the whole point of having this
10 bridge.

11 JUDGE SMITH: But why - - - why is that? What's
12 the connection?

13 MR. STORRS: I think that the - - - the point is
14 that if you provide an alternative, then - - - then
15 regardless, the individual criteria or the individual
16 dangerousness of crossing becomes less relevant; now
17 everybody can use the bridge. But this crossing was
18 viewed by DOT and - - - and the evidence is ample, not
19 just substantial, that this crossing was manifestly unsafe
20 as it was being used, and it was necessary to - - - to
21 close it. And the Appellate Division decision and the ALJ
22 decision, which the ALJ decision is in the record from the
23 78, clearly demonstrated, I think, without any question,
24 there was nothing pretextual about the decision - - -
25 about the safety - - - public safety and police power

1 basis for closing this crossing. This thing was a hazard,
2 especially in light of the increased speed with the
3 trains, which at this point were 110.

4 JUDGE RIVERA: Did I - - - did I misunderstand?
5 I thought I saw in your brief that your - - - you've
6 argued that the easement - - - I just want to stay with
7 the easement for one moment - - - is not the same kind of
8 property interest as the ownership in the - - - in the
9 land that they own and that they have to now circle around
10 to reach and that therefore it shouldn't be treated as a
11 taking, on that basis alone; putting aside whether or not
12 this is for safety or for some other reason that you
13 basically closed this down and extinguished the easement.

14 MR. STORRS: Well, the nature - - - I mean, I
15 think that goes to the point that the Supreme Court said
16 in Penn Central and this court said in Mendon, which is
17 that you - - - you don't look at isolated property rights
18 by themselves to determine whether there's been a taking
19 or a physical invasion. And here, you can't look at the
20 easement in - - - in a vacuum. You have to look at the -
21 - -

22 JUDGE SMITH: Suppose - - - suppose - - -

23 MR. STORRS: - - - impact of - - -

24 JUDGE SMITH: Suppose the easement and the land
25 were owned by different entities, and you take the

1 easement. Now you've taken the owner - - - you've taken
2 everything the owner has. Do you have to pay for it?

3 MR. STORRS: Your Honor, I don't think that's
4 possible under the circumstances. This is an easement
5 pertinent to this property. It's - - - it's inextricably
6 part of this property. It can't be sold separately; it
7 goes with the property. So I don't think it's possible
8 for there to be separate owners of the easement, and I
9 don't think it's possible for the easement to become
10 severed from the property. It has no meaning or value
11 apart from the property. And so you have to look at the
12 impact on the property as a whole, not just this narrow
13 easement.

14 JUDGE SMITH: Okay. But suppose the adjacent
15 landowner had an easement to get - - - to get the - - - an
16 easement to get across - - - you know, across Mr.
17 Naughton's property to - - - to a highway, and you decide
18 you're going to shut down the railway crossing in the
19 middle of that. Do you have to compensate that adjacent
20 landowner?

21 MR. STORRS: I - - - Your Honor, I don't think
22 so, again, for the same - - - for the same reason. I
23 mean, I guess, perhaps, it depends on the nature - - - if
24 his parcel became completely landlocked at that point and
25 - - - and there was an easement of which his parcel was

1 the - - - the dominant estate, and that dominant estate
2 was now landlocked, it's conceivable that there could be
3 an argument that there had been a taking not of the
4 easement but of the parcel which no longer had access.
5 But I think that's the kind of analysis that you'd have to
6 go through, not looking at this easement in isolation and
7 saying whether or not this has been taken or whether or
8 not it still exists.

9 And with respect to the Penn Central regulatory
10 test which - - - which is the test that this court and
11 obviously the Supreme Court have applied, the balancing of
12 those three factors in this court favors no compensation
13 here with respect to economic impact and with respect to
14 impact on - - - on distinct investment-backed
15 expectations. The claimant still has access to all of its
16 land from the public streets and continues to farm all the
17 land. The third factor is the character of the State's
18 action and, as we've been discussing, the character of the
19 actions, the exercise of the police power to protect the
20 public pursuant to a statute which authorizes to close
21 unsafe railroad crossings.

22 So in sum, I would suggest that there is no
23 precedent that supports the idea that this kind of
24 regulatory action for public safety considerations
25 constitutes a physical invasion or a taking warranting

1 compensation. This court has never so held and should not
2 start at this point.

3 CHIEF JUDGE LIPPMAN: Okay, counselor. Thank
4 you.

5 MR. STORRS: Thank you, Your Honor.

6 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

7 MR. NAUGHTON: Just quickly to answer the
8 question about could the State have ordered CSX to slow
9 down in this area, and the answer is that they could not,
10 because federal regulations preempt the State action with
11 respect to the speed of trains, and there's cases on that.
12 So that wasn't an option. And - - - and that's part of
13 the reason that closure really is the main option. They
14 also can't force CSX to change, do a lot of construction,
15 to allow this - - -

16 JUDGE SMITH: Suppose - - - suppose there's a
17 highway, suppose - - - it's not a - - - it's not a
18 railroad, it's a state highway, and there's a danger
19 because your - - - your vehicles are crossing that highway
20 all the time, and they're worried about collisions. They
21 could lower the speed limit on the highway, right?

22 MR. NAUGHTON: I think they could. The use - -
23 -

24 JUDGE SMITH: Do they have to - - - do they have
25 to compensate the drivers? Have they taken anything from

1 them?

2 MR. NAUGHTON: Not the drivers.

3 JUDGE SMITH: So how come - - - how come they
4 have to - - -

5 MR. NAUGHTON: Every time I go up and down
6 Taconic - - -

7 JUDGE SMITH: So how come - - - how come they
8 have to compensate - - -

9 MR. NAUGHTON: - - - I see that.

10 JUDGE SMITH: Well, they tell - - - they tell
11 you, bring your - - - bring your equipment around the long
12 way. Why do they have to compensate you?

13 MR. NAUGHTON: Because it's part of our
14 operation and it - - - basically, the property has lost
15 most of its value with respect to this business operation.

16 JUDGE RIVERA: What's your response to - - - to
17 the questions and your - - - your adversary's answer about
18 the - - - the nature of the easement. It can't be
19 considered in isolation - - - whatever loss you may be
20 arguing can't be considered in isolation because of the
21 purpose of this easement. He says an easement
22 appurtenant; you really have to look at the -- the value
23 of the property.

24 MR. NAUGHTON: I'm loathe to say this, but I
25 think it's - - --it's generally correct, that it's tied

1 into that easement, the use, and so that if you were to
2 cut off and we were to sell off that seventy-acre parcel,
3 I think the - - - the easement would be extinguished.

4 JUDGE SMITH: You said a moment ago that you - -
5 - that most of the value of your property has been
6 destroyed?

7 MR. NAUGHTON: Yes. I'm not going to argue that
8 all - - -

9 JUDGE SMITH: Well, what - - - does the record
10 show that?

11 MR. NAUGHTON: I think it's high - - - we don't
12 have any appraisals. We never got to the damage issue,
13 Your Honor. It - - - it's an unusual piece in that
14 there's a - - - Papscanee Creek cuts off most of the
15 access to the road, so you have to enter at the very
16 northern part, and during certain times of year, it's just
17 impassable.

18 CHIEF JUDGE LIPPMAN: Okay, counselor.

19 MR. NAUGHTON: Thank you.

20 CHIEF JUDGE LIPPMAN: Thanks. Thank you both,
21 appreciate it.

22 (Court is adjourned)

23

24

25

C E R T I F I C A T I O N

I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of Island Park, LLC v. State of New York, No. 132 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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