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Highways—Eminent Domain—Damages for Loss of Access

Phyllis F. Oman

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HIGHWAYS—EMINENT DOMAIN—DAMAGES FOR LOSS OF ACCESS*—Loss of or damage to a property owner's "right of access"¹ is compensable in eminent domain.² With the advent of limited-access highways, the question whether this "right of access" shall be interpreted as a right of "direct access" or merely of "reasonable access" has become the source of a large volume of litigation. If right of access entitles an abutting property owner to direct access, then its loss or damage is compensable in eminent domain. If, however, right of access entitles the property owner to only reasonable access, then loss of direct access is not compensable unless it is also unreasonable.

New Mexico recently has had occasion to re-assess its position with regard to right of access in *State ex rel. State Highway Comm'n v. Danfelser*.³ Prior decisions held that compensation must be paid if substantial damage to property results from loss of access.⁴ *Dan-*

* *State ex rel. State Highway Comm'n v. Danfelser*, 384 P.2d 241 (N.M. 1963), *cert. denied*, 375 U.S. 969 (1964).

1. "Right of access" or "easement of access" has been generally defined as a right of ingress to and egress from property to the main system of highways. *Rose v. State*, 19 Cal. 2d 713, 123 P.2d 505 (1942), as modified on denial of rehearing; *McGarrity v. Commonwealth*, 311 Pa. 436, 166 Atl. 895 (1933), *appeal dismissed*, 292 U.S. 19 (1934); *Chambersburg Shoe Mfg. Co. v. Cumberland Valley Ry.*, 240 Pa. 519, 87 Atl. 968 (1913); *Lang v. Smith*, 113 Pa. Super. 559, 173 Atl. 682 (1934); *Chicago & N.W. Ry. v. Milwaukee R. & K. Elec. Ry.*, 95 Wis. 561, 70 N.W. 678 (1897). See also 1 Lewis, *Eminent Domain* §§ 117-212 (3d ed. 1909).

However, the "right of access" is not an unrestricted right. Traffic regulations, such as prohibiting left turns, prescribing one-way traffic, prohibiting access or cross-overs between separated traffic lanes, prohibiting or regulating parking, and restricting the speed, weight, size, and character of vehicles allowed on certain highways, are not considered to be interferences with an abutting property owner's right of access. *Pickins v. McMath*, 215 Ark. 332, 220 S.W.2d 602 (1949); *Smith v. State Highway Comm'n*, 185 Kan. 445, 346 P.2d 259 (1959); *State ex rel. State Highway Comm'n v. Burk*, 200 Ore. 211, 265 P.2d 783 (1954); see also Annot., 73 A.L.R.2d 689 (1960); Annot., 100 A.L.R. 491 (1936); Cunningham, *The Limited-Access Highway from a Lawyer's Viewpoint*, 13 Mo. L. Rev. 19, 28 (1948).

2. "The precise origin of that property right [right of access] is somewhat obscure but it may be said generally to have arisen by court decisions declaring that such right existed and recognizing it." *Bacich v. Board of Control*, 23 Cal. 2d 343, 144 P.2d 818, 823 (1943). See also *Schiefelbein v. United States*, 124 F.2d 945 (8th Cir. 1942); *Rose v. State*, 19 Cal. 2d 713, 123 P.2d 505 (1942), as modified on denial of rehearing; *People v. Ricciardi*, 23 Cal. 2d 390, 144 P.2d 799 (1943); *Minnequa Lumber Co. v. City & County of Denver*, 67 Colo. 472, 186 Pac. 539 (1919); *Jacobsen v. Incorporated Village of Russell Gardens*, 201 N.Y.S.2d 183 (Sup. Ct. 1960); *Grand River Dam Authority v. Misenhimer*, 195 Okla. 682, 161 P.2d 757 (1945); *Fry v. O'Leary*, 141 Wash. 465, 252 Pac. 111 (1927).

3. 384 P.2d 241 (N.M. 1963), *cert. denied*, 375 U.S. 969 (1964).

4. Seven cases prior to *Danfelser* examined the right of access. The earliest case, *New Mexican R.R. v. Hendricks*, 6 N.M. 611, 30 Pac. 901 (1892), raised the question of whether an abutting property owner had a right of action against a railroad for damage to his right of access when the state surrendered its right in a public street to

allow construction of railroad tracks. *Held*, "the most the state can do is to surrender its own right to the public street or highway . . . [I]t cannot impair or surrender the property represented by the easement of private owners of abutting property in the right of way to and from their homes." *Id.* at 612, 30 Pac. at 901. If the owner of abutting property suffers hardship, "which is not common to the general public, such owner is entitled to compensation." *Ibid.*

The next case, *Tomlin v. Town of Las Cruces*, 38 N.M. 247, 31 P.2d 258 (1934), involved an effort by an abutting property owner to enjoin the town of Las Cruces from interfering with highway route signs which directed the main stream of traffic past his property. Injunctive relief was denied because there was no actual physical obstruction of the highway and "none of the usual rights of an abutter, such, for instance, as right of ingress and egress, are disturbed." *Id.* at 250, 31 P.2d at 260.

Mandell v. Board of Comm'rs, 44 N.M. 109, 99 P.2d 108 (1940), questioned whether a private person, whose property does not abut on the closed section of a street, has an easement of right-of-way superior to the statutory right of the county to close and vacate. *Held*, "one whose property does not abut on the closed section of a street or road ordinarily has no right to complain of the closing or vacation of such street or road, provided he still has reasonable access to the general street or road system." *Id.* at 112, 99 P.2d at 110. In some instances proof of special or peculiar damage will support damages, even when the complainant is not an abutting owner. "But damage sufferance must be substantially different in kind, and not merely in degree, from that suffered by the public in general." *Ibid.*

In *Board of County Comm'rs v. Slaughter*, 49 N.M. 141, 158 P.2d 859 (1945), an owner of business property brought suit for re-routing traffic. There was no change in the old highway on which the complainant abutted, nor was it disturbed or blocked at either end. The court, observing there had been no obstruction to the claimant's means of entrance or exit to her property, denied recovery. Viewing the question as purely a matter of asking damages for the re-routing of traffic, the court said that an individual has no vested right in the maintenance of a public highway in any particular place or in the flow of public travel.

Bennett v. Nations, 49 N.M. 389, 164 P.2d 1019 (1945), affirmed the right of a private individual to maintain a suit to enjoin highway obstruction whereby he, as an abutting owner of private property located beyond the point of obstruction, was compelled to travel over a circuitous and hazardous route between his property and the main system of roads. The court clarified what is meant by "special or peculiar damage" under *Mandell* saying:

'[A] property owner is specially injured by an obstruction which materially interferes with or substantially impairs his right of access, at least if the value of his property is thereby depreciated. This is often held to be true even though the obstruction is at some distance from such property, and the means of ingress and egress is not completely cut off.'

Id. at 393, 164 P.2d at 1022, quoting from 25 Am. Jur. *Highways* § 318 (1940).

In *Board of County Comm'rs v. Harris*, 69 N.M. 315, 366 P.2d 710 (1961), the owners of land abutting on a highway claimed compensation for damages suffered through depreciation in the value of their land when the highway grade was lowered so as to cause considerable inconvenience in obtaining ingress and egress to the property. The court held that under the New Mexico Constitution, which provides: "Private property shall not be taken or damaged for public use without just compensation," (N.M. Const. art. 2, § 20) an owner of private property is entitled to compensation for material consequential damages. Compensation was allowed. *Id.* at 317, 366 P.2d at 712.

The final case, *State ex rel. State Highway Comm'n v. Silva*, 71 N.M. 350, 378 P.2d 595 (1962), was an action for property damage to retail commercial property arising from being placed in an extended cul-de-sac created by closing one end of a highway where it joined a new controlled-access highway 800 feet north of the complainant's

felser is a case of first impression on the proposition that access to existing highways⁵ may be controlled without constituting a taking or damaging of property which requires compensation. Proceedings in eminent domain were brought to condemn a portion of the defendants' land for the purpose of constructing a two-way frontage road. After the taking, the defendants' only access to the divided highway, on which they formerly fronted, was via ramps or intersections placed at intervals along the highway. The trial court, on the basis of stipulated facts, concluded that the depreciation in the market value of the defendants' property occasioned by the loss of direct access was an unreasonable exercise of the police power and that compensation should be allowed. On appeal to the Supreme Court of New Mexico, *held*, Reversed insofar as it awarded the defendants compensation for loss of access.⁶ On rehearing, the court reached the same result, but the original opinion was withdrawn and a separate opinion was substituted.⁷ A strong dissent⁸ accompanied the majority opinion.

The court in *Danfelser* took the position that abutters have a right of access to the public roads system, but this right is merely a

property. The complainant's access to the old highway was undisturbed, and his access to the new highway was available at an on-grade interchange 350 feet south of the affected property. The court, viewing the claim as one for compensation due to loss of traffic, denied recovery saying:

[O]ne whose property abuts upon a road or highway, a part of which is closed or vacated, has no special damage if his lands do not abut upon the closed portion thereof, if there remains a reasonable access to the main highway system. If one has the same access to the road or highway upon which his property abuts as before the closing of a portion thereof and there remains a reasonable, even though more circuitous, access to the general highway system, his injury is the same in kind, even though greater in degree, as that suffered by the general public and is *damnum absque injuria*.

Id. at 355-56, 378 P.2d at 599.

5. The law has become fairly well established that the abutting owner is not entitled to any compensation for the state's failure to allow him access to a *new* controlled access highway constructed where no highway existed before. *People v. Thomas*, 108 Cal. App. 2d 832, 239 P.2d 914 (4th Dist. Ct. App. 1952); *D'Arango v. State Rds. Comm'n*, 228 Md. 490, 180 A.2d 488 (1962); *American Oil Co. v. Mississippi State Highway Comm'n*, 244 Miss. 821, 146 So. 2d 355 (1962); *State ex rel. State Highway Comm'n v. Burk*, 200 Ore. 211, 265 P.2d 783 (1954). The reasoning of the courts in such cases has been that since the abutting owner had no right of access to the highway before its construction, no existing right has been taken and none would accrue in the future since, when the new road was declared to be a controlled access facility, no right of access by implication could arise.

6. This opinion, *State ex rel. State Highway Comm'n v. Danfelser*, No. 7021, N.M., Dec. 14, 1962, is unreported.

7. *State ex rel. State Highway Comm'n v. Danfelser*, 384 P.2d 241, 247 (N.M. 1963).

8. *Ibid.* (Moise, J., dissenting).

right to reasonable, not unlimited, access to and from the land.⁹ Reasonable circuity of travel and any supposed loss in land value by reason of the diversion of express traffic are non-compensable.¹⁰ The court viewed the gravamen of the abutting property owner's complaint as a claim for compensation for damage resulting from loss or diversion of traffic¹¹ rather than as a claim for damage resulting from loss of direct access *per se*.¹² This finding was deemed not to be inconsistent with prior case law.¹³ *Board of County Commr's v. Harris*¹⁴ is a possible exception.

9. The court defined the right of access (as applicable in New Mexico) to be "a right of ingress to and egress from land on an abutting street or highway and therefrom to the system of public roads, subject to reasonable traffic regulations and not affected by diversion of traffic or reasonable circuity of travel." 384 P.2d at 246.

10. State *ex rel.* State Highway Comm'n v. Danfelter, 384 P.2d 241 (N.M. 1963).

11. Under Board of County Commr's v. Slaughter, 49 N.M. 141, 158 P.2d 859 (1945), mere diversion of traffic alone will not support a judgment for consequential damages. See note 4 *supra*.

12. Loss or diversion of traffic arising from loss of direct access may not be the gravamen of the abutting property owner's claim for compensation in all cases. The court has not, but perhaps should, draw a distinction between residential and commercial property based upon the elements causing depreciation in property value. The damaging loss to residential property lies in the property owner's inability to obtain direct access to the main traveled portion of the road, whereas the damaging loss to retail commercial property lies in the inability of the traveling public to obtain direct access to the abutting landowner's property. Thus, the court's refusal to pay for loss of traffic is justifiable only where the affected property is retail commercial property, the value of which is dependent on traffic. This justification is not equally applicable to residential property because reduction of traffic volume may actually be advantageous to the property owner. But even where residential property value depreciates due to loss of direct access, the loss arises not from loss of traffic or the traveling public, but from the property owner's loss of immediate accessibility to the main highway system.

13. The majority opinion distinguished the prior cases on the following bases: (1) *New Mexican R.R. v. Hendricks*, 6 N.M. 611, 30 Pac. 90 (1892), and *Bennett v. Nations*, 49 N.M. 389, 164 P.2d 1019 (1945), involved "total deprivation of access to the general highway system"; (2) State *ex rel.* State Highway Comm'n v. Weatherly, 67 N.M. 97, 352 P.2d 1010 (1960), merely dealt with a procedural question; and (3) *Board of County Commr's v. Harris*, 69 N.M. 315, 366 P.2d 710 (1961), related to a change of grade as it affected access and is not in point under the facts in *Danfelter*. The court, while not affirming, expressly refused to overrule *Board of County Commr's v. Slaughter*, 49 N.M. 141, 158 P.2d 859 (1945), and treated that decision as controlling. It said:

In this case, to allow compensation would require an overruling of *Slaughter*, and this we decline to do. There is no justification under our decisions to distinguish between diverting traffic by moving a right-of-way or by building a fence.

We declined to permit compensation for the diversion of traffic caused by moving a right-of-way in *Slaughter*, and reason and logic require a similar result here where the diversion is by reason of the fence.

State *ex rel.* State Highway Comm'n v. Danfelter, 384 P.2d 241, 246 (N.M. 1963).

The dissent took strong exception to the majority's rather summary disposal of prior case law. *Id.* at 247-52 (dissenting opinion).

14. 69 N.M. 315, 366 P.2d 710 (1961).

On the basis of *Harris*, it is difficult to understand why damage to similar property

The effect of *Danfelser* is to deny compensation for loss of direct access except when accompanied by unreasonable circuitry of travel. This leads to the assumption that it is the unreasonable circuitry of travel which is the compensable item of damage.

The standard by which "reasonableness of circuitry" of travel is to be determined and the measure of compensation to be awarded when unreasonable circuitry of travel is determined are not clear. Prior New Mexico case law offers little concrete aid in determining what is, or is not, "reasonable circuitry" of travel.¹⁵ Presumably, reasonableness of circuitry of travel is a question for the trier of fact to determine from all the circumstances of the particular case.¹⁶

The determination of the measure of compensation consistent with New Mexico law, which may be awarded when the trier of fact determines that circuitry of travel accompanying loss of direct access

arising from a change in grade which results in the same inconvenience is compensable and is not considered as compensation for loss of traffic.

Damage to retail commercial property arising from loss of direct access which results in inconvenience of ingress and egress is non-compensable as compensation for loss of traffic.

15. In *Mandell v. Board of Comm'rs*, 44 N.M. 109, 99 P.2d 108 (1940), the court indicated that something more than mere inconvenience, when another reasonable (though perhaps not equally accessible) means of access to the main street system remains, is necessary to create a legal and compensable right in a person claiming injunctive relief to prevent the closing of a street. *Id.* at 112, 99 P.2d at 110. This standard was affirmed in *Board of County Comm'rs v. Slaughter*, 49 N.M. 141, 143, 158 P.2d 859, 862 (1945); *Bennett v. Nations*, 49 N.M. 389, 393, 164 P.2d 1019, 1021 (1945); and *State ex rel. State Highway Comm'n v. Silva*, 71 N.M. 350, 352, 378 P.2d 595, 598 (1962).

What constitutes "mere inconvenience" and, hence, what "more" is needed to create "unreasonable circuitry" are unclear. In *Bennett*, compensation was allowed where the complainant, because of highway obstruction, was compelled to travel first more than a mile over a circuitous and hazardous route "at great inconvenience" and then across private land in order to reach his own property. Whether the "great inconvenience" was the result of a single element, *i.e.*, distance of one mile, circuitousness, hazardousness, or crossing private land, or a combination of part or all of these elements, was not specified.

The court in *Silva* found no unreasonable circuitry where the complaining property owner, in order to travel north via the main highway system, was compelled to first travel south 350 feet and then return an additional 350 feet north in order to obtain a starting position equal to the one he possessed prior to his loss of direct access.

16. However, the scope of the question open to the trier of fact has been limited by a case, decided subsequent to *Danfelser*, which held that mere access to a frontage road is reasonable access to the main system of public roads *as a matter of law*. In *State ex rel. State Highway Comm'n v. Lavasek*, 385 P.2d 361, 364 (N.M. 1963), the court said:

[W]here a property owner is afforded complete ingress and egress to a frontage road on which his property abuts, from which he has reasonable access to the main system of public roads, any inconvenience suffered by him is merely non-compensable circuitry of travel.

is unreasonable, presents a more difficult problem. Is compensation for unreasonable circuity of travel accompanying loss of direct access to be determined (1) in relation to the effect it has upon the value of property left without reasonable access, or (2) without regard to any effect upon property value which results from deprivation of reasonable access?

The New Mexico Constitution requires just compensation¹⁷ for the taking or damaging of private property for public use.¹⁸ The general rule in New Mexico for arriving at just compensation for property not taken but adversely affected,¹⁹ as in the case of unreasonable circuity, is the "before and after" rule.²⁰ Under it, the owner of the property is entitled to receive the difference between the fair market value of his land before and after it is damaged.²¹

17. "Just compensation" requires a full indemnity for the loss sustained by the owner of the property when the same is taken or injured for public use. *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 326 (1893); *Phelps v. United States*, 274 U.S. 341 (1927); *United States v. Miller*, 317 U.S. 369, 373 (1943); *Board of Comm'rs v. Gardner*, 57 N.M. 478, 483, 260 P.2d 682, 685 (1953) (fair and reasonable compensation).

For a general discussion of compensable and non-compensable elements to be considered in determining the loss sustained by the property owner see 5A Thompson, *Real Property* § 2582 (1957 repl.); 1 Elliott, *Roads and Streets* §§ 273-99 (4th ed. 1926); 1 Orgel, *Valuation Under Eminent Domain* (2d ed. 1953); 2 Nichols, *Eminent Domain* §§ 6.1-45 (3d ed. 1950). In New Mexico see *United States v. Jaramillo*, 190 F.2d 300 (10th Cir. 1951); *United States v. Cox*, 190 F.2d 293 (10th Cir. 1951), *cert. denied*, 342 U.S. 867 (1951).

18. N.M. Const. art. 2, § 20.

19. For three alternative formulas for measuring "just compensation" in partial-taking cases which result in damage to the remainder, see 1 Orgel, *op. cit. supra* note 17, at §§ 48-51.

20. The "before and after" rule of compensation for losses or injuries to private property in condemnation cases contemplates an award of the difference between the fair market value of the property in question before the taking (or damage) and its fair market value after the taking (or damage). *Board of County Comm'rs v. Slaughter*, 49 N.M. 141, 143, 158 P.2d 859, 860 (1945); see generally 29 C.J.S. *Eminent Domain* § 139 (1941).

"Fair" market value is the price which an owner, if he were willing to sell, could get from a potential buyer who wanted the land, if such a buyer existed and could be found. *Netherton, Control of Highway Access* 318 (1963); see also *Transwestern Pipe Line Co. v. Yandell*, 69 N.M. 448, 456, 367 P.2d 938, 943 (1961); *Board of County Comm'rs v. Gardner*, 57 N.M. 478, 485, 260 P.2d 682, 686 (1953). However, there are elements of damage for which no compensation will be awarded even though the market value of the land is adversely affected. *Board of County Comm'rs v. Slaughter*, 49 N.M. 141, 143, 158 P.2d 859, 860 (1945); citing 29 C.J.S. *Eminent Domain* § 162 (1941). See also note 15 *supra*.

21. The New Mexico Supreme Court recently stated its position with regard to the proper measure of compensation for property not taken, but adversely affected, in the following terms:

[T]he correct measure of damages is the difference in the value of the property immediately before the taking and the value of the property immediately after

Just compensation includes all elements of value that inhere in the property taken.²²

Location is probably the element which contributes most to the value of real property. Value derived from location may arise in either of two ways. Property value may be enhanced (1) by accessibility *from* the property to the main system of roads, or (2) by accessibility from the main system of roads *to* the property.²³ Traffic is an *inherent* factor in determining the "before" property valuation, at least as to accessibility from the property to the main system of roads (which will relate primarily to retail commercial property²⁴). Therefore, it is impossible to compensate for loss in property value using the "before and after" rule without either (1) compensating for loss of traffic, by paying the difference between former high property values derived largely from traffic and subsequent reduced property value resulting from loss of traffic; or (2) adopting an unrealistic view of the "before and after" rule of damages, by eliminating traffic as an element of the "before" valuation of the property.²⁵

the taking, the owner being entitled to the difference in these sums, in addition to a recovery for the various elements of damage to the remaining land not taken but injuriously affected. *City of Tucumcari v. Magnolia Petroleum Co.*, 57 N.M. 392, 259 P.2d 351; *Board of County Comm'rs of Santa Fe County v. Slaughter*, 49 N.M. 141, 158 P.2d 859; 38 A.L.R.2d 790; 29 C.J.S., *Eminent Domain* § 139; that where the taking results in benefit to the lands not taken, then the benefits are to be offset against the damages. *Board of Comm'rs of Dona Ana County v. Gardner*, 57 N.M. 478, 260 P.2d 682; that where there are no benefits and no consequential damages as a result of the taking, then the correct measure of damages is the reasonable market value of the land taken. *Middle Rio Grande Conservancy District v. Crabtree*, 69 N.M. 197, 365 P.2d 442.

Transwestern Pipe Line Co. v. Yandell, 69 N.M. 448, 454, 367 P.2d 938, 942 (1962).

22. The basis for an estimate of the sum required to be paid the owner of property is not limited to the uses to which he has devoted the land, but it is to be arrived at upon a just consideration of all the uses for which it is suitable. 5A Thompson, *Real Property* § 2582, at 704-05 (1957 repl.), and cases cited therein; *Board of County Comm'rs v. Good*, 44 N.M. 495, 499, 105 P.2d 470, 472 (1940); see also *United States v. Jaramillo*, 190 F.2d 300, 302 (10th Cir. 1951); *United States v. Cox*, 190 F.2d 293, 296 (10th Cir. 1951), *cert. denied*, 342 U.S. 867 (1951).

23. The two are not merely a rephrasing of the same concept, because value derived through accessibility from the property to the main system of roads relates only to circuitry of travel, *i.e.*, the route one must travel to obtain access to the main highway system. Whereas, value derived through accessibility from the main system of highways to the property involves traffic, *i.e.*, the value to be derived from having the traveling public pass one's door, as well as circuitry of travel. See note 12 *supra*.

24. Although the value of all property, and especially all commercial property, is dependent upon reasonable accessibility, only retail commercial property is absolutely dependent upon direct, easy access so that the public may reach the property.

25. It is obvious that any estimate of the value of retail commercial property is unrealistic which does not take accessibility to the buying public into account.

The first alternative is objectionable for reasons of precedent²⁶ and public policy.²⁷ The second alternative is objectionable because it denies to the retail commercial property owner compensation for the major part of his loss by estimating his "before" property value without reference to its most valuable element. Therefore, if the court maintains that the compensation for unreasonable circuity of travel in relation to change in property valuation is to be determined by using the "before and after" rule, it must resolve a conflict arising from the simultaneous application of two incompatible principles of law. One principle denies compensation for loss of traffic, and the other requires compensation for loss of traffic as a factor inherent in awarding just compensation.

But compensation for unreasonable circuity of travel *per se*, determined without regard to resulting change in property valuation, poses even more difficult problems of compensation. Undoubtedly, with proper instruction, a jury could arrive at a figure representing compensation for expense, inconvenience, and any other damaging elements of unreasonable circuity of travel. But would such a figure compensate for the damage actually sustained? Has not unreasonable circuity created more damage than that represented by expense for gas mileage, or increased travel time, or inconvenience? Probably the greatest damage sustained by the property owner is devaluation in property due to relative inaccessibility. However, compensation for this places one squarely in the dilemma presented by the first alternative, *i.e.*, simultaneous application of the "before and after" rule of damages and denial of compensation for loss of traffic.

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26. Board of County Comm'rs v. Slaughter, 49 N.M. 141, 158 P.2d 859 (1945); State *ex rel.* State Highway Comm'n v. Silva, 71 N.M. 350, 378 P.2d 595 (1962); see note 4 *supra*.

27. Costs for construction of new highways or improved re-routing of traffic would be prohibitive if each abutting property owner on the old highway or route had to be compensated for loss of property value arising out of diversion of traffic.