University of Miami Law Review

Volume 18 | Number 3 Article 8

5-1-1964

Eminent Domain -- Compensation for Land Subjected to the Threat of Condemnation

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CASES NOTED

EMINENT DOMAIN—COMPENSATION FOR LAND SUBJECTED TO THE THREAT OF CONDEMNATION

In 1957 the State Road Department publicly announced that the route of a new interstate highway would pass through Orlando, Florida. The following year, the Department commenced several condemnation suits in order to acquire the right of way for the highway. The suit to acquire the parcels here involved, however, was not instituted until May, 1960. During the interim the market value of the land declined as a result of the anticipated condemnation. The jury rendered a verdict on the basis of the property's depressed value. Upon the property owners' contention that error had been committed in admitting testimony concerning the property's depreciated value, a new trial was granted which was affirmed by the district court of appeal.[1] On certiorari[2] to the supreme court, *held*, affirmed: when the value of the property has depreciated in light of an anticipated taking, the condemnation is to be calculated by disregarding the effect of the anticipation. *State Rd. Dep't v. Chicone*, 158 So.2d 753 (Fla. 1963).

The Florida Constitution[3] provides that a property owner be adequately and fairly compensated for property which is taken from him for public use. Generally, the valuation which is established, whenever possible, will be the property's fair market value.[4] In computing the fair market value, and in an effort to reach the desirable objective of a fair and equitable result,[5] at least four points in time have been utilized for the purpose of estimating the property's value: (1) at the time of the actual taking;[6] (2) at the time when there has been a change in value;[7]

1. State Rd. Dep't v. Chicone, 148 So.2d 532 (Fla. 2d Dist. 1962), wherein the court challenged the validity of the rule set forth in Sunday v. Louisville & N.R.R., 62 Fla. 395, 57 So. 351 (1912) as applied to eminent domain cases generally, and specifically, refused its application in the *Chicone* case.

2. FLA. R. APP. P. 4.5. See also note 19 *infra*.

3. FLA. CONST. art. 16, § 29. See 12 FLA. JUR. *Eminent Domain* § 67 (1957):
Property cannot be taken for public use without adequate compensation. The constitution specifically forbids the taking of property for public use without just compensation. A taking without justification is also a violation of both the state and federal constitutional provisions prohibiting the taking of a person's property without due process of law.

4. 4 NICHOLS, EMINENT DOMAIN § 12.2 (3d ed. 1962); Boyer & Wilcox, *An Economic Appraisal of Leasehold Valuation in Condemnation Proceedings*, 17 U. MIAMI L. REV. 245, 249 (1963).

5. 18 AM. JUR. *Eminent Domain* § 240 (1938).

6. Southern Elec. Generating Co. v. Leibacher, 269 Ala. 9, 110 So.2d 308 (1959); Gabriel v. Cox, 130 Conn. 165, 32 A.2d 649 (1943); Crist v. Iowa State Highway Comm'n, 123 N.W.2d 424 (Iowa 1963); Collinwood v. Kansas Turnpike Authority, 181 Kan. 43, 310 P.2d 211 (1957); *In re* Mackie's Petition, 362 Mich. 697, 108 N.W.2d 755 (1961);

(3) at the beginning of the condemnation proceedings;[8] and (4) at the time of the service of summons.[9]

When property has appreciated in value as a result of the anticipated condemnation, the above four rules are generally to the advantage of the property owner;[10] *per contra*, if there has been a depreciation in value, an inequitable result would obtain.[11]

Some jurisdictions have specifically provided for an exception to the previously mentioned four rules generally considered in the event of

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Mississippi State Highway Comm'n v. Stout, 242 Miss. 208, 134 So.2d 467 (1961); Berry v. State, 103 N.H. 147, 167 A.2d 437 (1961); State v. Jones, 27 N.J. 257, 142 A.2d 232 (1958); Tulsa County Drainage Dist. Number 12 v. Wright, 165 P.2d 639 (Okla. 1946); State Highway Comm'n v. Anderson, 381 P.2d 707 (Ore. 1963); Frontage, Inc. v. County of Allegheny, 400 Pa. 249, 162 A.2d 1 (1960); L'Etoile v. Director of Pub. Works, 89 R.I. 394, 153 A.2d 173 (1959); South Carolina State Highway Dep't v. Miller, 273 S.C. 286, 117 S.E.2d 561 (1960); City of Huron v. Jelgerhuis, 77 S.D. 600, 97 N.W.2d 314 (1959); State v. Rascoe, 181 Tenn. 43, 178 S.W.2d 392 (1944); State v. Lasiter, 352 S.W.2d 915 (Tex. Civ. App. 1961); State v. Smith, 171 P.2d 853 (Wash. 1946); State v. City of Dunbar, 142 W.Va. 332, 95 S.E.2d 457 (1956); Grant v. Cronin, 12 Wis. 2d 352, 107 N.W.2d 153 (1961).

7. City & County of Denver v. Smith, 381 P.2d 269 (Colo. 1963); City of Ashland v. Queen, 254 Ky. 329, 71 S.W.2d 650 (1934); State v. Hayward, 243 La. 1036, 150 So.2d 6 (1963); Cole v. Boston Edison Co., 338 Mass. 661, 157 N.E.2d 209 (1959); *In re* Thrags Neck Expressway, 16 App. Div. 2d 570, 229 N.Y.S.2d 947 (1962); Town of Ayden v. Lancaster, 197 N.C. 556, 150 S.E. 40 (1929). In all of the above cited cases the change in value had been an ***appreciation*** as a result of the anticipated condemnation and the courts refused to let the condemnee profit.

8. United States v. Miller, 317 U.S. 369 (1942); United States v. McCrory Holding Co., 294 F.2d 812 (5th Cir. 1961); Missouri & N. Ark. R. Co. v. Chapman, 150 Ark. 334, 234 S.W. 171 (1921); Department of Pub. Works & Bldg. v. Divit, 251 Ill. 2d 93, 182 N.E.2d 749 (1962); State v. Pahl, 257 Minn. 177, 100 N.W.2d 724 (1960); Union Elec. Co. v. Stahlschmidt, 365 S.W.2d 493 (Mo. 1963); *In re* Platte Valley Pub. Power & Irrigation Dist., 159 Neb. 609, 68 N.W.2d 200 (1955); White v. State Highway Comm'n, 201 Va. 885, 114 S.E.2d 614 (1960).

9. Dong v. State, 90 Ariz. 148, 367 P.2d 202 (1961); Oregon-Washington R.R. & Nav. Co. v. Campbell, 34 Idaho 601, 202 Pac. 1065 (1921); Weber Basin Water Conservancy Dist. v. Ward, 10 Utah 2d 29, 347 P.2d 862 (1959).

10. Florida is among those states allowing the condemnee to recover the value of his land as appreciated by the anticipated condemnation. See Sunday v. Louisville & N.R.R., 62 Fla. 395, 57 So. 351 (1912).

11. The inequities to the condemnee in the depreciation situation are discussed in 4 NICHOLS, EMINENT DOMAIN § 12.3151[2] (3d ed. 1962):

> To allow a public agency to depress market values in a particular neighborhood by threatening to erect an offensive structure in its midst, and then to take advantage of this depression in paying for the land required for the structure *would be so abhorrent to the public sense of justice that it has never been seriously argued that it could be done.* (Emphasis added.)

Yet, at least three states have been confronted with the argument that the depreciation in value is of no concern to the condemnor. State v. Hollis, 93 Ariz. 200, 379 P.2d 750 (1963); Congressional School of Aeronautics, Inc. v. State Rd. Comm'n, 218 Md. 236, 146 A.2d 518 (1928); City of Cleveland v. Carcione, 190 N.E.2d 52 (Ohio App. 1963). All three decisions were in line with the *Chicone* case. Further, the Arizona and Ohio cases were also cases of first impression.

Those states which provide for assessment "at the time of the actual taking," by a liberal interpretation could, and probably would, reach the same result. They need only interpret the time of taking to be that time when it becomes known that there will be a condemnation.

a depreciation in value.[12] In order to protect the taxpayers' monies, as well as the condemnee's interests, at least two states have provided that valuation should be made at a point just prior to any fluctuation in value which may occur as a result of the anticipated governmental acquisition.[13]

In Florida, however, the general rule since at least 1912[14] has been: "[T]he amount of compensation to be awarded to a property owner when his property is sought to be taken in an eminent domain proceedings is the value of the land taken *at the time of the lawful appropriation.*"[15] The "time of the lawful appropriation" has been determined to be at the time of the filing of the condemnation suit in the proper court.[16] Consequently, if the property appreciated in value as a result of the anticipated appropriation, the owner would be enriched to that extent.[17]

State Rd. Dep't v. Chicone[18] presented a novel situation for the Florida Supreme Court; the property *depreciated* in value as a direct result of the prospective condemnation. The court, in an effort to reach an equitable result, and because of the obvious factual uniqueness involved,[19] declined to apply the general rule and adopted instead, the rule adhered to in Maryland.[20] The Maryland rule is that compensation should be awarded on the basis of what the value would be if the lands were not to be taken and the public improvement were not to be made.[21] Therefore, as a result of the *Chicone* case, Florida now has two rules for valuation in eminent domain proceedings: (1) when the value of the property has remained unchanged or appreciated as a result of the anticipated condemnation, value is assessed at the time of the lawful appropriation;[22] and (2) when the value has *depreciated* in light of an anticipated taking, value is calculated by disregarding the effect of the anticipation.

12. State v. Hollis, note 11 *supra;* Congressional School of Aeronautics, Inc. v. State Rd. Comm'n, note 11 *supra*; City of Cleveland v. Carcione, note 11 *supra* and accompanying text.

13. Congressional School of Aeronautics, Inc. v. State Rd. Comm'n, 218 Md. 236, 146 A.2d 558 (1958); City of Cleveland v. Carcione, 190 N.E.2d 52 (Ohio App. 1963).

14. Sunday v. Louisville & N.R.R., 62 Fla. 395, 57 So. 351 (1912).

15. Yoder v. Sarasota County, 81 So.2d 219, 220 (Fla. 1955), citing to Sunday v. Louisville & N.R.R., note 14 *supra.*

16. Sunday v. Louisville & N.R.R., note 14 *supra;* Yoder v. Sarasota County, note 15 *supra;* Anhoco Corp. v. Dade County, 127 So.2d 464 (Fla. 3d Dist. 1961).

17. Sunday v. Louisville & N.R.R., note 14 *supra;* Yoder v. Sarasota County, note 15 *supra;* State Rd. Dep't v. Chicone, 158 So.2d 753 (Fla. 1963) (dicta).

18. 158 So.2d 753 (Fla. 1963).

19. The court pointed out that the *Sunday* and *Yoder* cases involved appreciation, whereas *Chicone* involved depreciation. The conflict jurisdiction which supported the issuance of a writ of certiorari was based on the fact that the former cases ruled that value was to be estimated at the time of taking (filing of the suit) and the instant one ruled that value was to be estimated at some time prior to the "taking."

20. Congressional School of Aeronautics, Inc. v. State Rd. Comm'n, 218 Md. 236, 146 A.2d 558 (1958).

21. *Id.* at 250, 146 A.2d at 565.

22. See cases cited in note 17 *supra.*

No writer could reasonably challenge the soundness of the court's position in the instant case. When an arm of the government seeks to take a man's property, every protection should be afforded the citizen so that he is fairly compensated. *Chicone* provides just that protection through a rule which assures that equity will be done. The law of Florida now fully protects all property owners who are confronted with eminent domain proceedings. To achieve a position closer to perfection in this area, only one step remains—the adoption of the corollary to the *Chicone* rule; that is, complete adoption of the Maryland rule so that the owner neither loses in the event of depreciation nor gains in the event of appreciation. This type of transition would not only protect the condemnee, but would also ensure that public funds would be fairly and prudently disbursed.

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PROBATE—DISCOVERY AVAILABLE IN WILL CONTESTS

The daughter of the testator renounced the ten dollars awarded her under the will in probate, and filed a petition for revocation of probate of the will, alleging the lack of mental capacity of the testator and undue influence. Prior to the trial the petitioner attempted to use certain discovery devices by serving the respondent-executors with requests for admissions, interrogatories, a notice for taking depositions, and a motion for production of documents. The objections of the respondent-executors were sustained and discovery was denied on the ground that the Florida Rules of Civil Procedure were inapplicable to a proceeding of this nature. By certiorari review of the interlocutory order, *held*, order quashed: a will contest is both a civil action and a special proceeding in the county judge's court, and when filed within a probate proceeding, the parties are entitled to the use of discovery devices provided for in the Florida Rules of Civil Procedure. *Estes v. Estes*, 158 So.2d 794 (Fla. 3d Dist. 1963).

A "will contest" is a legal proceeding brought for the purpose of determining whether or not a will is valid.[1] At the time that the right to devise realty by will was first conferred, it was not possible to contest a testamentary disposition[2] since there were no proceedings available to probate a will devising real property.[3] On the death of the testator the devisee under the will took possession of the land. Anyone who desired

1. *E.g.*, McCrary v. Michael, 109 S.W.2d 50 (Mo. App. 1937); Smith v. Negley, 304 S.W.2d 464 (Tex. Civ. App. 1957).

2. Campbell v. Porter, 162 U.S. 478 (1896); *In re* Dana, 138 Fla. 676, 190 So. 52 (1938); *In re* Duffy, 228 Iowa 426, 292 N.W. 165 (1940); *In re* Noble, 338 Pa. 490, 13 A.2d 422 (1940).

3. *In re* Duffy, *supra* note 2.