Nebraska Law Review

Volume 51 | Issue 1 Article 6

1971

Depreciation Damages: A Condemnor's Windfall

James Cada
University of Nebraska College of Law, jim@cadalaw.com

Comment

DEPRECIATION DAMAGES: A CONDEMNOR'S WINDFALL

I. INTRODUCTION

In many instances, landowners suffer economic loss between the announcement of a public improvement where private land will be acquired and the actual condemnation of that land. A good example of this "planning blight"[1] can be seen in Lincoln, Nebraska, where the Northeast Radial will be built.[2] The initial study for the Northeast Radial was begun in the 1950's, and actual acquisition of the property began in 1968. Acquisition for the Radial has been proceeding quite rapidly, with construction to begin, tentatively, in the target area in the summer of 1972.[3] With the enactment of LB190[4] in the 1971 session of the Nebraska Legislature, acquisition has almost come to a complete standstill, more than likely delaying the construction for a longer period of time. This law provides relocation payments for persons displaced due to land acquisition by a governmental subdivision of the state. Although LB190 will help to alleviate some of the problems that residents in the Northeast Radial area may have, under the existing Nebraska Statutes there is still no compensation for the depreciation of land value that occurs between the time of the announcement of the proposed improvement and the actual date of condemnation.

This comment will explain the problem in detail: It will describe what some state courts, other than Nebraska's, have done to ease

---

[1] Glaves, *Date of Valuation in Eminent Domain: Irreverence for Unconstitutional Practice*, 30 U. CHI. L. REV. 319, 327 (1963).

[2] After public hearings to develop the plan, the Northeast Diagonal Highway was made a part of the Comprehensive City Plan, Lincoln, Neb., completed in Aug., 1942, and prepared by Harland Bartholomew & Associates, St. Louis, Mo. It was defined in the Comprehensive Regional Plan, prepared by the same consultants and adopted by the Lincoln City-Lancaster County Planning & Zoning Com'n, on April 12, 1961. A later detailed study called for an elevated, limited access, four lane thoroughfare to run from near downtown Lincoln in a northeasterly direction for approximately five miles, and acquisition for right-of-way covered a one block wide area.

[3] The initial acquisition area, where construction of the Northeast Diagonal was to begin, was designated by the Director of Public Utilities in the spring of 1970.

[4] NEB. REV. STAT. §§ 76-1201 to -1212 (Supp. 1971). This law follows the standards of the Federal Relocation Act of 1970 in setting up relocation payments for individuals displaced by federal projects.

the problem; it will show what the Nebraska Supreme Court has said in regard to "just compensation for land owners"; and it will demonstrate the procedures adopted by some state legislatures to aid the landowner. This should show a trend across the nation to compensate landowners for this depreciation, and it may point the way Nebraska will be traveling in the future.

II. THE PROBLEM

A landowner's right in eminent domain is established by the Fifth Amendment of the United States Constitution[5] and Part I, Section 21 of the Nebraska Constitution.[6] They provide that private property shall not be taken for public use without just compensation.

In 1951 the Nebraska Legislature enacted the Uniform Act for Eminent Domain,[7] which provided a uniform procedure for all agencies[8] with the power of condemnation.[9] There must be an offer and bonafide attempt to negotiate, and proceedings may be brought if the parties fail to agree; whereupon the petition to condemn may be filed by the condemnor in the county court of the county where the property is located.[10] Of course, in many instances, the property values in an area to be condemned will increase, *e.g.*, where speculation involves the possibility that one may be able to put in a gas station or receive a better access to his property, but not every project will cause a rise in real estate values. Where the proposed condemnation is for a junk yard, city dump or an airport, the result would generally be a decrease in value. The landowner should not then be penalized because his property is going to be used for that purpose rather than for another purpose where the land value would increase. This phenomenon has been referred to as "planning blight."[11]

---

[5] U.S. CONST. amend. V. "[N]or shall private property be taken or damaged for public use, without just compensation therefore."

[6] NEB. CONST. art I, § 21. "The property of no person shall be taken or damaged for public use without just compensation therefor."

[7] NEB. REV. STAT. § 76-701 *et seq.* (Reissue 1966).

[8] Fitle, *Procedure Under the New Eminent Domain Act of 1951*, 35 NEB. L. REV. 259 (1956).

[9] Certain exceptions are the condemnation of an existing public utility, NEB. REV. STAT. § 76-703 (Reissue 1966), and of public school lands, NEB. REV. STAT. § 72-224.01 *et seq.* (Reissue 1966).

[10] Salter, *Nebraska Procedure in Eminent Domain*, 38 NEB. L. REV. 441-44 (1959).

[11] Note 1 *supra.*

The cloud of condemnation hanging over the landowner's property between the announcement of the project and the actual time of acquisition is a serious economic and social problem. It freezes the owner's right to sell the land during this period of time; tenants will move out and become impossible to replace; the landowner will have no desire to keep up his property since it will be torn down soon and repair is actually an economic waste. The city can even go so far as to enforce strictly building codes and enact ordinances restricting building or construction of improvements. Police protection may drop off, vandalism will be encouraged, property values will drift downward to almost nothing.

The general rule is that a mere declaration of an intention to take, or even a threat to take, does not constitute a taking under the Fifth Amendment.[12] "Planning blight" is caused by the combination of many factors, and once begun, it feeds upon itself. The owner actually could not sell if he wanted to sell. It would be a waste of money to improve his property, so he must just sit and wait until the condemnor decides to file his Petition of Condemnation. When that finally happens, the landowner will end up with a small portion of what his actual value would have been had his land not been subjected to the threat of condemnation. The Fifth Amendment does not require compensation for losses or expenses incurred by owners or tenants incidental to, or as a consequence of condemnation if they are not reflected in the market value of the land at the time of the taking.[13] The uncertainty caused by the probability that the proceedings will be carried through and the proposed construction will begin on the prospective land differs in degree only from the uncertainty surrounding other property which may, at any time, be taken by eminent domain whenever it may lie in the path of a public improvement. The decrease in the income, or any other damages the landowner may suffer from such uncertainty are held to be *damnum absque injuria*.[14] These depreciation damages are looked upon as just one of the costs of owning property and all a matter of relativity between one piece of property and the next.

On the other hand, it seems prohibitive to ask the government to pay for every injury suffered as the result of its projects when the projects are for the public good and the public use. One could also point out that the actual acts which physically depreciated the

---

[12] Woodland Market Realty Co. v. City of Cleveland, 426 F.2d 955 (6th Cir. 1970); City of Brook Park v. Columbia Rd. Inv., Inc., 23 Ohio Misc. 363, 256 N.E.2d 284 (1970).

[13] Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893).

[14] A wrong done for which the law provides no remedy. 6 J. SACKMAN, NICHOLS ON EMINENT DOMAIN § 26.45 at 323 (3d rev. ed. 1965).

property may not have been done by the condemnor, but may have been done by the owner (in the case where he refuses to keep up his property), or by some administrative agency (such as a building inspections agency that will not allow the landowner to improve his property), or by vandals and vermin. With the more recent relocation assistance programs, such as LB190[15] and the Federal Relocation Assistant Act of 1970,[16] there is even a greater tendency for tenants to vacate, causing the landowner to lose his rentals, which in turn causes even more rapid deterioration as the whole area becomes more and more deserted.

III. UPDATE VALUATION TIME

It would appear that if just compensation is to be paid in these cases, we should make an exception to the general rule that property is valued for condemnation purposes as of the time of filing the condemnation petition. An increasingly accepted method for fairly treating property value fluctuation caused by the imminence of condemnation is an updating of the time of valuation.[17] One of the earliest cases to develop this approach was *United States v. Miller*.[18] In that case, land was condemned to allow the relocation of a railroad which would be flooded in the development of the Central Valley Reclamation Project. The project had been contemplated for a considerable period,[19] and the necessity of relocating the railroad was foreseen in the original plans. The land taken had been designated as one of the alternate routes of the railroad. Holding that evidence of enhancement in value should be excluded, the Court said:

> The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be con-

---

15 Note 4 *supra*.

16 Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C.A. § 4601 (1970).

17 Note, *The Condemnor's Liability for Damages Arising Through Instituting, Litigating, or Abandoning Eminent Domain Proceedings*, 1967 UTAH L. REV. 548.

18 317 U.S. 369 (1943).

19 The project was authorized in 1932 and the property was condemned Dec. 14, 1938.

> demned. The owners ought not to gain by speculating on probable increases in value due to the Government's activities.[20]

The Court here dealt with the question of the increase in value arising from the government project, but the case is also cited in instances of a depreciation in value. In *United States v. Virginia Electric & Power Co.*,[21] the majority of the Court held that in allocating market value for agricultural uses between the owner of the fee and the owner of an easement for power purposes, the Court must exclude "any depreciation in value caused by the prospective taking."[22] The court cited the *Miller* case in reaching its conclusion.

Ordinarily, in the absence of direct governmental interference with the use and enjoyment of property, a de facto taking will not be held to exist.[23] The states are divided as to whether there should or should not be compensation for the depreciation in value.[24]

IV. TRADITIONAL VIEW

In the cases in which compensation is denied, the courts have shown their concern for the problem of culpability. Usually, the landowners in these cases ask for a date of valuation earlier than the date of the taking, and they ask the court to construe as a taking some act of the condemnor which led to the depreciation. For the most part, the courts refuse to stray from the established rule as to the date of valuation and require some actual physical invasion by the condemnor before they will declare a taking. Not only in the traditional sense are damages set on the day of valuation, but the amount of damages must be real. Only actual interests in land will be compensated for in condemnation proceedings. Damages for depreciation and loss of business are not recoverable.[25]

---

[20] 317 U.S. at 377.

[21] 365 U.S. 624 (1961).

[22] *Id.* at 636.

[23] United States v. Causby, 328 U.S. 256 (1946); United States v. 967.905 Acres of Land, Etc., Cook Co., Minn., 305 F. Supp. 83 (D. Minn. 1969).

[24] Should be compensated: Lipinski v. Lynn Redevelopment Authority, 355 Mass. 550, 246 N.E.2d 429 (1969); State *ex rel.* State Highway Comm'n v. Vesper, 419 S.W.2d 469 (Mo. Ct. App. 1967,; City of Cleveland v. Carcione, 118 Ohio App. 525, 190 N.E.2d 52 (1963). Should not be compensated: Danforth v. United States, 308 U.S. 271 (1939); Hempstead Warehouse Corp. v. United States, 98 F. Supp. 572 (Ct. Cl. 1951); Housing Authority of the City of Decatur v. Schroeder, 222 Ga. 417, 151 S.E.2d 226 (1966).

[25] I. LEVEY, CONDEMNATION IN U.S.A. § 22 at 249 (1969).

There is no constitutional limitation in Nebraska on the right to take private property for public use under the power of eminent domain, except for the right to just compensation.[26] It has long been the general rule in this state that the market value of land taken by eminent domain proceedings are computable as of the date of the taking, which is deemed to occur when the Petition for Condemnation is filed.[27] We arrive at two elements which must be considered when determining what the landowner will receive: (1) just compensation; and (2) the date of taking, *i.e.*, when the Petition for Condemnation is filed.

Just compensation is measured by the loss to the landowner caused by the appropriation of his property by the state. Compensation for land taken by eminent domain is measured by the fair market value of the property as of the date of the appropriation, including any factor that would influence the market value in the mind of a good faith purchaser.[28] It would appear, then, that the continuing depreciation of the worth of the land caused by the proposed public improvement should be accounted for, since it influences the market value.

There has not been a case in Nebraska specifically regarding the question of depreciation damages, but the Nebraska Supreme Court in *Prudential Insurance Co. v. Central Nebraska Public Power & Irrigation District*[29] ruled on appreciation in value. The court said that the owner is entitled to the benefit of an appreciation resulting from the general expectation of the construction and successful operation of the condemning agency's irrigation system. Therefore, there is no problem with appraisal of property at the time of the condemnation when there is an increase in value, because the court requires the time of taking to be the time of condemnation and the appraisal to be made as close to that time, thereby establishing the value as of the date of taking. The same would be true where a depreciation had occurred, but at a time when the value of the land is considerably deflated. The rule is that the actual appraisal must be made near enough to that point of time to furnish a test of the market value as of the date in question, *i.e.*, the date of the filing of the Petition of Condemnation.[30]

---

[26] Hammer v. Department of Rds., 175 Neb. 178, 120 N.W.2d 909 (1963).

[27] Platte Valley Pub. Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N.W.2d 200 (1955).

[28] Iskey v. Omaha Pub. Power Dist., 185 Neb. 724, 178 N.W.2d 633 (1970).

[29] 139 Neb. 114, 296 N.W. 752 (1941).

[30] Schmailzl v. State Dep't of Rds., 176 Neb. 617, 126 N.W.2d 821 (1964). In this case, the improvements on the property condemned had been

V. TRADITIONAL VIEWS, OTHER STATES

The Missouri Supreme Court does not feel that planning and anticipation of a public improvement necessitate payment of damages. In *Hamer v. State Highway Commission*,[31] the landowner was seeking damages for his expenses involved in redesigning and replatting his entire subdivision to conform to the plans of the highway commission in their building of a road through his land when subsequently the State Highway Department decided not to build the road. The court declined to give the landowner relief: "[I]n the absence of bad faith or unreasonable delay upon the part of the party which instituted such [condemnation] proceedings, . . . the owner is not *constitutionally* entitled to recover . . . ."[32] The Missouri rule being that a decrease in income or other loss from such uncertainty is held to be *damnum absque injuria*.[33]

In a Texas case, *State v. Vaughn*,[34] tenants began moving out of the landowner's building when they found out it was to be condemned. The Texas Appellate Court held that the resulting loss was an incidental damage for which no compensation was due. The Massachussets Supreme Court in *Town of Swampscott v. Remis*,[35] found that pending judgment of condemnation, the landowner's property could not be sold nor improvements made profitably and no income could be derived therefrom. The court claimed that without a finding that the property is completely unusable, no compensation is due for the period between the adoption of the order to take and the entry of the judgment of condemnation and this does not violate the Fourteenth Amendment of the Constitution of the United States.

---

destroyed by the time of the trial, and the appraisals used as testimony were made prior to the time of condemnation. The court allowed earlier appraisals when made almost a year prior to the time of the filing of the Petition of Condemnation in arriving at the market value of the property. It should be noted that the trial court allowed photographs to be offered, supposedly taken around the time of condemnation, to show the value of the property, since the jury could not view the premises personally. Judge Carter, dissenting, and Justice Brower, concurring in the dissent, stated that the evidence was to remote to be allowed in this case and that in the case where the measure of recovery is the market value of the property taken, the price paid for the property is wholly immaterial. It has no relation, whatsoever, to the market price of the property on the date of the taking.

31 304 S.W.2d 869 (Mo. 1957).

32 *Id.* at 873.

33 A wrong done for which the law provides no remedy.

34 319 S.W.2d 349 (Tex. Civ. App. 1958).

35 350 Mass. 523, 215 N.E.2d 777 (1966).

VI. MODERN TREND

In the cases in which the property owner has been compensated for depreciation in value, the courts have not usually been concerned with what caused the damage to the property, *i.e.*, whether it be the fault of the condemnor, vandalism, or whatever; they are really concerned with the actual loss to the landowner, what he will suffer if he is not compensated. In an early landmark decision, *In re South Twelfth Street in City of Allentown*,[36] the Pennsylvania Supreme Court allowed compensation for depreciation in value, saying:

> [T]he municipality in the furtherance of public ends, having stripped the land of nearly its entire value [by plotting a street forty years prior to opening it], now when it seeks to accomplish fully its purposes in connection therewith, is to be allowed to acquire the land by paying a sum measured by the little value the municipality has left in it. Such a result would be a travesty on the the constitutional provision which requires in all such cases just compensation to be made for the property taken.[37]

In *City of Buffalo v. J. W. Clement Co.*,[38] the New York court agreed with the trial court's findings that the acts of the city (in making repeated statements that the property would be condemned as of a certain date) had destroyed the value of the landowner's property and made the property unfit for his present and future use; relying upon those statements, the owner moved his business; thus, it was held that there was a de facto taking of the property four years prior to the condemnation proceedings. The decision of the court was based heavily on the reliance factor. This is one of the first cases where the theory of equitable reliance was used in this type of depreciation case.[39] The equitable reliance theory is grounded upon the requirement that the one party either intended or should have known that his act would induce such reliance.

---

[36] 217 Pa. 362, 66 A. 568 (1907).

[37] *Id.* at 366, 66 A. at 569.

[38] 34 App. Div. 2d 24, 311 N.Y.S.2d 98 (1970).

[39] The court said: "While the general rule in eminent domain cases is that a condemning authority does not become liable to a condemnee until title to the property is officially taken . . . it is settled that a *de facto* taking does occur when there has been a physical invasion of a condemnee's property or a direct legal restraint on its use. . . ." *Id.* at 29, 311 N.Y.S.2d at 103. The dissent follows the traditional theory arguing that there was no *de facto* taking absent entry onto the property and actual taking of possession.

In *City of Cleveland v. Carcione,*[40] the Ohio court compensated the owner for "planning blight."[41] The city of Cleveland had passed a resolution that it intended to appropriate property for an urban renewal project, and during the next six years it acquired and demolished properties around Carcione's property.[42] The court held that where the value of a parcel of property has depreciated because of the action of the condemning authority, the owner of such parcel is entitled to the fair market value of his property at the time the condemning authority takes the first active steps which to any extent depreciate the value of the property.[43]

An interesting case arose in a Michigan Federal District Court[44] concerning property owned by the Madison Realty Company and located in an urban renewal project area in the City of Detroit. Madison voluntarily conveyed the property to the city in 1965, then brought suit claiming the city's activities constituted a taking prior to the time of the voluntary transfer.[45] The court decided that the taking had actually occurred three years prior to the date the city actually purchased the property because the city had denied building permits, refused to grant a reassessment for tax purposes, continued to inform the people in the area that it was going to be condemned, and denied the landowner many city services. The court said:

> No *lis pendens* on file ever provided a more effective notice to the public to avoid dealings with "the plagued"; no actual condemnation proceeding ever carried any greater finality from a business standpoint than a constant, powerful, capable and continuously published threat of condemnation. Initiation of eminent domain proceedings is not a prerequisite to a finding that a "taking" has in fact occurred allowing for recovery by a property owner. The totality of these acts by the Defendant City contributed to and accelerated the decline in value of plaintiff's property in 1960 so as

---

[40] 118 Ohio App. 525, 190 N.E.2d 52 (1963).

[41] Note 11 *supra.*

[42] The income had dropped from over $8,000 in 1957 to less than $600 in 1961.

[43] 118 Ohio App. at 532, 190 N.E.2d at 56-57.

[44] Madison Realty Co. v. City of Detroit, 315 F. Supp. 367 (E.D. Mich. 1970).

[45] The city may have had a valid argument when it stated that plaintiff had waived all claims by accepting their offer and selling the property voluntarily. If the realty company did not think the amount was sufficient, they should have filed an inverse condemnation suit or waited until the time of condemnation and declared full damages in that manner.

> to constitute a "taking" of that property within the meaning of the 5th Amendment to the United States Constitution.[46]

In *City of Cleveland v. Kacmarik*,[47] the city instituted a suit to condemn the property, then tore down the landowner's building for violating the building code. The Ohio court stated that the city should not be allowed to condemn property, then exercise its police power and destroy the building, thus escaping payment to the owners; however, the court seemed to intimate that if the building would have been uninhabitable prior to the condemnation suit and torn down before filing the suit, the city would have been liable for the building's value.[48]

Damages for land may be fixed at the value thereof before the condemnation action. In *Tharp v. Urban Renewal & Community Development Agency of the City of Paducah*,[49] the Kentucky court stated:

> [W]e have recognized the corollary rule that the "before" valuation date is at the time just before it was generally known that the public project would be performed . . . the landowner is not to be penalized for any depreciation in value attributable to the public's learning of the condemnation. . . .[50]

VII. APPLICABLE STATUTES

Both Pennsylvania and Maryland have statutes aimed at relieving depreciation damages. Pennsylvania statutes[51] cite the time when imminence of condemnation becomes general knowledge as the date when the decrease in value should be excluded. Maryland statutes[52] state that the effective date of legislative authority for the acquisition of such property is the period of time when a

---

[46] 315 F. Supp. at 371.

[47] 177 N.E.2d 811 (Ohio C.P. Cuyahoga County 1961).

[48] The court said: "It has long been held that a jury cannot evaluate land being condemned as of the day when the legislative body passed the resolution of condemnation, or as of the day of the filing of the suit in court. In general, it is the law that 'in an appropriation case, the value of the property being taken is to be determined *as of the time of the trial.*'" *Id.* at 813.

[49] 389 S.W.2d 453 (Ky. 1965).

[50] *Id.* at 456.

[51] PA. STAT. tit. 26, § 1-604 (1964): "Any change in the fair market value prior to the date of condemnation . . . shall be disregarded in determining fair market value.

[52] MD. ANN. CODE art. 33A, § 6 (1967): "[P]lus the amount, if any, by which such price reflects a diminution in value . . . ."

decrease in the market value should be excluded. The State of New Jersey also has legislation[53] which provides that the time of taking shall be deemed to be the date when the redevelopment agency declares that an area is blighted. This is the simple solution in problems where there is going to be an urban renewal project, but it does not, of course, aid the landowner when his land is condemned for a highway.

Another alternative to this enigma would be the advance acquisition of land in an area where a proposed public improvement is to be located. Allowing a state or its agencies to purchase property at the time the plan is designed would alleviate depreciation problems and also any problems that might arise due to the landowner's desire to build improvements on the property. The question is whether such a law could be enacted without violation of constitutional limitations, loss of tax revenue, and rigid commitments of planning.[54]

VIII. CONCLUSION

In Nebraska damages are to be assessed as of the date the condemnation petition is filed,[55] and any depreciation damages shall not be accounted for prior to that time.[56] Although there have been no Nebraska cases on point, this area of condemnation law is in a state of change. And rightly so, as there is a serious question as to whether there has been just compensation under the Fifth Amendment applicable through the due process clause of the Fourteenth Amendment under the Nebraska law as it now stands. There appears to be a national trend to account for the damages caused by threat of condemnation. The grey area between a clear cut case of a taking and a nontaking has been often classified as *damnum absque injuria.*[57] This grey area is diminishing through the liberalization of the strictly construed valuation date.[58] The courts and a

---

[53] N.J. STAT. ANN. § 20:1-9 (1967): "[I]f the land or other property is being acquired in connection with development or redevelopment of a blighted area, then . . . the value . . . shall be fixed and determined to be no less than the value as of the date of the declaration of blight by the governing body upon a report by a planning board."

[54] 52 MINN. L. REV. 1175 (1968).

[55] Note 27 & 30 *supra.*

[56] Note 25 *supra.*

[57] Note 33 *supra.*

[58] Notes 39 & 48 *supra.*

small number of state legislatures are beginning to view social values as an essential criteria in arriving at just compensation. The legislative solutions of Pennsylvania, Maryland, and New Jersey have relieved some of the problems, but factual situations may still arise where the landowner is still "shortchanged" out of his actual loss. Lack of proof of damages will continue to be a problem in evaluation in a condemnation case. Until the condemning agency decides that it must assist the landowner in this problem (not claiming its hands are tied by legislative limitations) or the legislature provides for a means to compensate for "planning blight," the citizen will not receive the just compensation that is his due.

James Cada '72