

As to the State's contention that it was immune from suit, the court ruled that to permit that defense in this case would result in utterly vitiating the constitutional provision providing for just compensation for the taking of private property for public use, for it would mean that the owner of property alleged to have been taken without compensation would be left without judicial recourse. While an owner's property was subject to the power of eminent domain, it would be contrary to the explicit guarantee of the constitution to say that if the State took property without giving the required compensation, it thereby became immune from any suit to obtain that compensation.

The trial court's decision was reversed and the case was remanded for a determination of the decrease in value of the property. (Thom v. State, 138 N.W.2d 322, December 1965)

182-2 FLORIDA COURT RULES STATE DID NOT ABUSE DISCRETION IN TAKING SITE OF FUTURE CHURCH PARISH SINCE CONVENIENCE AND ECONOMY COULD BE CONSIDERED IN CHOOSING LAND TO BE USED FOR FILL.

The Florida State Road Department brought action to condemn an unimproved parcel of land owned by the Catholic Burse Endowment Fund, Inc. The purpose for taking the land was to obtain a source of fill for the construction and maintenance of a portion of Interstate Highway 75. The owners had intended to use the land as a Catholic parish, which in the future was to include church, school, convent, and rectory buildings. The trial court granted the department's petition for an order of taking, and upon appeal by the owners to a district court of appeal this order was affirmed.

The trial court made the following findings of fact: (1) The site in question consisted of 18 to 20 acres, and was located between Florida Avenue and Interstate 75, abutting to some extent upon both. (2) The intended borrow pit would be considerably less than 300 feet from both of these highways. (3) In order to locate the borrow pit on the subject land, the department had waived its own regulation which required borrow pits to be set back 300 feet from an Interstate right-of-way. (4) The department's search for a borrow pit site, except for an examination of the subject property, had been superficial, but the location chosen was ideal from the standpoint of cost and convenience to the contractor building the road. (5) From an esthetic point of view, the location of a borrow pit on the intended site would constitute a blight on the surrounding area, including apparently the view from the highway as well as the surrounding neighborhood. (6) The land was well suited for its intended use by the owners as a parish site and comparable property in the area was not readily available.

The owner contended that the department's apparent disregard of factors other than the cost, plus the "arbitrary" limitation of the area from which to obtain fill, amounted to a gross abuse of discretion. It further contended that the condemner should have considered the owner's intended use of the property, the benefit to the community from this intended use, and the effect of the condemner's use on the surrounding property from an esthetic point of view.

The appellate court affirmed the trial court's ruling that that court could not substitute its judgment for that of the condemner which did not abuse its discretion nor did it act capriciously in selecting the tract in question. The factors of economy and convenience, relative to both present construction and future maintenance of the highway, were legitimate reasons for selecting a site to be condemned.

The appellate court also upheld the ruling that the condemner did not abuse its discretion in condemning the entire fee simple even though the land would be used solely as a source of fill and that it could take all of the land which it stated it needed now and in the future for highway purposes. (Catholic Burse Endowment Fund, Inc. v. State Rd. Dep't, 180 So.2d 513, December 1965)

182-3 MARYLAND'S HIGHEST COURT RULES ACCESS TO EXISTING HIGHWAY MAY NOT BE DENIED UNDER THE POLICE POWER BUT MUST BE ACQUIRED BY CONDEMNATION

Dr. and Mrs. Jones owned a 25-acre tract, part of which fronted on Md. Route 144 and the other part on U.S. Route 29. They used private driveways to reach both highways. They also owned a 1.3-acre tract which was located on the opposite side of Route 29. The State roads commission, by resolution, designated Route 29, for a distance of about 14 miles, as a controlled-access arterial highway. Shortly hereafter, the commission filed a condemnation petition against the owners for the purpose of acquiring the small tract and "all the right whatsoever of ingress and egress between the through highway [Route 29] and the remaining property of the \* \* \* [owners] \* \* \* to the end that there will never be any vehicular, pedestrian and/or animal access to or from the through highway" and the owners' remaining property. Their access to Route 144 was left intact. The commission deposited \$4,001, \$4,000 of which was for the condemned parcel and \$1.00 for the closing of the driveway to and the denial of all access along Route 29.

During negotiations, the roads commission refused to discuss with the owners the question of compensation for the closing of the driveway and the denial of access, taking the position that there was no damage, and, in any event, the damage, if any, was not compensable. At the request of the owners, the trial court entered a summary judgment in their favor as to that part of the suit relating to the condemnation of their right of access to Route 29. The commission appealed to the court of appeals. That court noted that the commission had contended that the denial of access constituted a proper exercise of the police power so that no compensation was payable but that the commission was unable to reconcile this contention with the fact that the suit was brought pursuant to its powers of eminent domain and that it actually had paid damages into court. The amount of damages (\$1.00) was nominal but it was the sum of money deemed by the commission to be the fair value of the damages to the remaining land. Because these two positions could not be reconciled, the highest court permitted the parties to stipulate that the case should be treated as a petition for a declaratory judgment to determine whether access under the facts of the case could be denied under the police power or had to be acquired by condemnation under the principles of eminent domain.

The commission argued that in order to make conventional highways safer for the transportation of the public it was necessary to use the police power to limit or deny access to the abutting landowner and that this was a proper exercise