

EFFECT OF PRE-CONDEMNATION VALUE CHANGES
ON THE TIME OF TAKING RULE

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The compensation to be paid for land taken in eminent domain proceedings is very much affected by the date which the court selects for valuation. Particularly in cases in which a highway is to be constructed, property values are often affected in advance of construction because the coming of the highway is known for some time prior to the taking. Usually the announcement of the coming highway has an inflationary effect on land values. A recent Missouri case raises the opposite problem, a situation in which property values depreciated prior to the taking.

On October 31, 1960, the St. Louis Housing Authority filed a suit to condemn a parcel of land on which the Housing Authority intended to construct a low-rent housing project. (1) Commissioners appointed pursuant to the Missouri constitution (2) returned an award in the amount of \$4500 which was paid into the court by the condemnor on July 14, 1961. The condemnor then filed exceptions to the amount of the award and the cause was tried before a jury.

At the trial the owner's expert witness testified that the value of the property as of October or November, 1960, near the time of the filing of the condemnation petition, was \$4800, while the value of the property at the time the award was paid into the court by the condemnor was \$4165. Thus the owner seemingly alleged that there had been a general decline in the value of the property between the date of the Housing Authority's official act of filing suit to condemn the owner's parcel of land, and the date the Housing Authority deposited the Commissioners' award into court. Apparently property values started to depreciate after the filing of the condemnation suit. The Housing Authority objected to the introduction of this evidence, urging that compensation should be based only on the value of the property on the date the award was deposited in court. This objection was sustained, and the jury found the fair market value of the property as of July 14, 1961, the date the award was paid into court, to be \$2200. The Supreme Court affirmed the decision on the basis of the ruling in City of St. Louis v. International Harvester Co. (3)

The opinion in the principal case does not indicate what the owner offered as evidence to show depreciation in property value. If he offered evidence to prove value as of the date of the filing of the petition of condemnation, then the trial court was clearly correct, under present Missouri law, in rejecting the offer of proof. (4)

The court's holding that the effect of the condemnation proceeding is not to be considered in fixing just compensation is correct insofar as the court bases its conclusion on the time of taking rule.(5) Just compensation is fair market value, which is the price the property would bring between a willing seller and a willing buyer(6), and is given only for a taking, and is therefore not ascertainable until there is a taking. Missouri cases corroborate this view by holding that condemnation proceedings can be abandoned without liability on the part of the condemnor, unless abandoned unreasonably.(7) An owner is liable for all property taxes up to the payment of the award.(8) Any damage resulting from the filing of a condemnation suit is non-compensable in these proceedings, and any action for such damages must be an action sounding in tort.(9)

What the court in the principal case did not consider was the effect of pre-taking depreciation attributable to the project on the compensation to be paid at the time of taking. While the time of taking rule usually governs compensation in eminent domain, there are qualifications to the rule arising out of pre-taking events. One such modification is found in United States v. Miller (10), in which the United States adopted a project to condemn a strip of land across respondent's land to be used for railroad tracks. On August 26, 1937, the project was given final approval by the government. On December 14, 1938, the United States filed a complaint in eminent domain against the respondent and on the same day filed a declaration of taking. The Supreme Court of the United States said that depreciation or appreciation attributable to the taking was to be disregarded. The Court framed a test for determining just compensation which modified the time of taking rule. It ruled that if the land was probably within the scope of the project from the time the government was committed to it (11), any change in value subsequent to that date was to be disregarded. Since there was a positive act on the part of the government which established the project, the rule was meant to deal with the problem of fluctuating value between the date of the government's official act authorizing the project and the time of taking (12). The Miller rule apparently starts to run, then, from the date of the official authorization to take or condemn a piece of property.

Other courts have framed similar tests. In State Road Department v. Chicone (13), the department announced the route of an interstate highway in 1957, for the construction of which four parcels of land owned by plaintiff were required. The first of a number of condemnation suits was filed in 1958, but the suit to acquire plaintiff's land was not instituted until May 10, 1960. The court moved the official act required by the Miller rule back even farther by basing compensation on the property value as it would have been at the date of taking without the threat of condemnation. The date used by the court was

the official announcement of the government to construct the highway, and the court was willing to disregard the effect on property values between that date and the date of taking.

On the other hand, the mere designation of land for inclusion in a project does not constitute a taking. In a recent Texas case (14), the city of Houston passed an ordinance of public necessity authorizing the construction of a civic center. Plaintiff's land was within the area needed for the project. A condemnation suit was filed, but the city moved to dismiss after the verdict but prior to the rendition of the judgment. While the trial court overruled the motion to dismiss, the Texas court of appeals reversed. Although the marketability of the property was interfered with and the owner suffered incidental damage, the court held that no taking had occurred. The threat of condemnation is simply one of the conditions under which a landowner holds property.

To be compared with these cases is A. Gettleman Brewing Co. v. City of Milwaukee. (15) The city passed a resolution in 1937 to widen a street in Milwaukee and the brewing company's property was acquired by condemnation in 1940. The court did not consider the effect on property values of the delay which occurred between the date authorizing the project and the date of the final taking of the owner's property for that purpose. (15) Here again the court considered only the value of the property at the time of taking and did not exclude pre-taking depreciation, as there apparently had been no official adoption of the project in 1937. Under the Miller rule, however, fluctuating property values between the date authorizing the project and the final taking would have been disregarded.

Pre-taking effects are an important problem in eminent domain proceedings. If pre-taking effects are to be disregarded in determining just compensation, perhaps the rule established in the Miller should be used by a greater number of courts. Another possibility is to shift the date of taking, although this change would be difficult to accomplish. One court has held that a taking occurred when the owner's property was razed pursuant to the passage of a blight determination ordinance. The condemnation proceeding had not been completed, and thus there had been no official "taking" at the time. (16) Other courts have based the time of taking on a date earlier than the Missouri date, such as the time the petition for condemnation is filed (17), the time the summons was issued (18), or the time of trial. (19)

The problem is a difficult one, as the principal case shows. If the time of taking is all that is considered, problems of "just compensation" will continue to occur. In the principal case, if the property

depreciated in value between the time the petition to condemn was filed in court and the time of taking, it seems correct that this depreciation be disregarded. As long as the case is considered solely as a time of taking problem, and pre-taking activities are not considered, the court's decision is a correct one as the law in Missouri now stands. But it leaves the problem of pre-taking fluctuations in property values unresolved, a problem which will continue to arise in highway and related programs.

Footnotes

1. St. Louis Housing Authority v. Barnes, 375 S.W.2d 144 (Mo. 1964).
2. Mo. Const., Art. I, 26 (1945).
3. 350 S.W.2d 782 (Mo. 1961). In this case the court said that just compensation for the taking of private property is the fair market value at time of taking, which is the date on which the amount the commissioners' award is paid. The supreme court in the principal case also cited State ex rel. City of St. Louis v. Beck, 333 Mo. 1118, 63 S.W.2d 814 (1933), in which the court held that damages suffered by a property owner as the result of the completion or the delay of condemnation proceedings could not be recovered as an element of damages.
4. City of St. Louis v. International Harvester Co., 350 S.W.2d 782 (Mo. 1961).
5. Brunn V. Kansas City, 216 Mo. 108, 115 S.W. 446 (1909).
6. Graves, Date of Valuation in Eminent Domain: Irreverance for Unconstitutional Practice, 30 U. Chi. L. Rev. 319 (1963). The elements of fair market value are location, uses for which the property is suitable, zoning, available utilities, municipal services and transportation, City of St. Louis v. Vasquez, 341 S.W.2d 839 (Mo. 1961), and interest on any unpaid amount after the taking. State v. Galloway, 292 S.W.2d 904 (Mo. 1956).
7. Kansas City v. McElroy, 331 S.W.2d 28 (Mo. 1959).
8. In re Certain Lands in Kansas City, Clay County, 344 S.W.2d 104 (Mo. 1961).
9. In re Armory Site in Kansas City, 282 S.W.2d 464 (Mo. 1955).
10. United States v. Miller, 317 U.S. 369 (1942).

11. Ibid.
12. *Glaves*, supra note 6.
13. 158 So.2d 753 (Fla. 1963). For a similar case see *City of Cleveland v. Carcione*, 190 Ohio App. 525, 190 N.E.2d 52 (1963).
14. *City of Houston v. Biggers*, 380 S.W.2d 700 (Tex. 1964).
15. 245 Wis. 9, 13 N.W. 2d 541 (1944).
16. *City of Cleveland v. Kacmarik*, 17 Ohio Op.2d 135, 177 N.E.2d 811 (1961).
17. *Illinois City Water Co. v. City of Mount Vernon*, 11 Ill.2d 547, 144 N.E.2d 729 (1957).
18. *Doug v. Arizona ex rel. Willey*, 90 Ariz. 148, 367 P.2d 202 (1961).
19. *Williams v. City and County of Denver*, 147 Col. 195, 363 P.2d 171 (1961). Pre-taking changes are especially important in highway cases. Usually, the announcement of the highway inflates property values, and if the Miller rule is applied the highway will benefit. But since the route is known sometime in advance of the taking, one could argue that the date of the announcement of the route is the date to be used in highway situations to which to apply the Miller rule. If this is not the date to apply in such situations, what is? Should it be the date an official map is published, if one is authorized. Is it the unofficial publication of the route? The passage of the resolution of necessity. The selection of the Miller date in highway cases poses difficult choice problems.