LIABILITY FOR CHANGE OF PLANS AFFECTING CONSTRUCTION OF HIGHWAY

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Highway departments compelled to make changes in plans in highway construction may find themselves facing actions for specific performanance or for damages by property owners who allege that they have been adversely affected by the change. In a recent Missouri case (1), the landowner counterclaimed for specific performance of an alleged agreement between him and the highway commission under which the landowner was to convey title to his land in return for construction by the state of an overpass giving him access to the planned highway. His counterclaim was dismissed and the dismissal was affirmed on appeal. This case raised two questions, but only the first question was raised by the appeal: 1. When a landowner enters into a settlement with the highway commission concerning the construction of a proposed highway, may the landowner obtain specific performance of the settlement if the highway commission changes its plans? 2. If the landowner may not obtain specific performance, under what theory may he recover additional compensation?

Action for Specific Performance

Although the question of whether a highway commission is suable on a contract is usually covered by state statute, the problem of whether the highway commission can be compelled specifically to perform a contract covering highway plans, or enjoined from building a highway contrary to those plans, has been left to case law. It is generally held that any action against the highway commission is an action against the state, which may consent to be sued without waiving its immunity in federal courts, where it is protected by the Eleventh Amendment to the Constitution of the United States in diversity of citizenship actions.(2) A clue to the disposition of a specific performance action against the state highway commission in a state court may be provided by the cases dealing with diversity actions against state highway agencies in federal court.

Actions for damages against a state turnpike commission have been allowed in federal court when the cause of action has arisen out of a contract to perform services for the commission. The state is not considered the real party in interest because, as the test is usually stated, a judgment against the turnpike commission does not affect the treasury of the state; the turnpike commission is a self-sufficient agency supported at first by bond issues and then by its tolls. The state treasury test was rejected, however, when a landowner tried to

remove a condemnation suit by the turnpike commission to a federal court on grounds of diversity of citizenship.(4) In holding that it was barred from assuming jurisdiction, the federal court laid great emphasis on the similarity between the turnpike commission and the highway commission in the performance of the function of providing a highway system for the state. Thus any action in a federal court against a turnpike commission or similar agency for specific performance or a mandatory injunction could be denied on jurisdictional grounds if the court looks to the function which the agency is performing.(5)

In a state court, the standard reasoning for denying specific performance by or a mandatory injunction against the state highway (or turnpike) commission is that the agency has fundamental governmental powers which can not be contracted away. This test looks again at the function of the commission. To grant either remedy would impinge on the highway commission's ability to carry out its paramount duty to the state in the exercise of its governmental powers for the public interest and welfare.(6) Although there is dicta in the Missouri case (7) that specific performance might be granted if the landowner can show that the highway commission abused its discretion by making a change in plans or by making a decision that was not what the public interest and safety required, no case has been found in which specific performance has been granted in these circumstances. The courts appear unwilling to overrule and sometimes unwilling even to review (8) any decision of the highway commission on the grounds that an abuse of discretion has occurred.(9)

Action for Damages

When the highway commission changes its original plans to the detriment of a landowner after there has been either a voluntary settlement or a court award of compensation, under what theory can the landowner recover additional compensation if the highway plans are changed? To recover in a breach of contract action because of a change of highway plans the landowner must show that the original plans were specifically included as part of the agreement for the conveyance of the land. For example, a contract which merely stated that the consideration for the land was "$1,000 and benefits to be derived from construction off the highway" was held to be too general to support a breach of contract action arising out of a change in the level of the highway.(10) Even when an agreement with the highway commission specifically provides for access at a designated point, the highway commission has been able to avoid the breach of contract action by claiming that it did not violate the contract but further appropriated a property right of access when it changed the original plans.(11) When a defense to a breach of contract is allowed, the landowner is forced to sue by way of inverse condemnation to recover

his additional damages. The only possible defense for the highway commission, the state's sovereign immunity from suit, would not be available against an inverse action, which is founded on the constitution.(12) Although state statutes allow the highway commission to sue and be sued on a contract, the courts seem reluctant to allow a breach of contract against the highway commission when the contract violation results in the taking of an additional property right. The theory seems to be that the breach of contract is incidental.

When the landowner enters into a voluntary agreement to convey his land to the state and accepts a reduced compensation for the land only because of his mistaken reliance on the finality of highway construction plans which will cut his damages, the landowner may still be able to collect additional compensation when the plans are changed to his detriment, even though he failed to incorporate the original highway plans in his written agreement. In one such case (13) a landowner who operated a drive-in theatre accepted a lower price than he wished for his land because the plans which were represented to be final provided for access to an adjacent tract. When an agent of the highway department pointed out that he could buy the adjacent tract and build a theatre there, the landowner accepted a lower price for his land, purchased the other land, and built a new theatre. The plans were later changed to deny access to the adjacent tract except by a circuitous route, so that the landowner not only had sold his land for less than it was worth, but also had lost in value a large part of his expenditure for the new theatre. He sued on the theory of mistake to recover the difference between the value of his land and the price for which he sold it.

The court permitted the recovery, saying that it could be justified on the theory of mutual mistake, mistake induced by a representation of the highway commission, or unilateral mistake by the landowner known to the highway commission. The court called the theory rescission because the land was subject to condemnation and already had a highway built upon it when the action was brought, and consequently could not be restored to the owner, but it was as near as the facts permitted.(14) The court, after saying that it could not give damages for the diminished value of the new theatre solely for mistake, held that the damage could be recovered on the theory of fraud if the negotiating highway employee or his superiors knew that the highway plans were not final or unalterable. Thus through the use of recission theory the landowner was able to recover money damages because of the impracticability of making the highway commission restore the land to the owner and then start condemnation proceedings to retake possession of it.(15)

One other possibility for recovery is open to the landowner if his property is acquired in a condemnation proceeding. When the highway commission introduces its highway construction plans at trial to mitigate the damages for the taking of the land, the highway commission will have to pay additional damages if it later changes the plans it introduced at the trial and the landowner is damaged. Although the highway commission may have a right to limit access by the use of its police powers, the police power doctrine will not eliminate the additional liability of the highway commission should it change its plans. The question of damages in the condemnation proceedings will be reopened whenever compensation was originally predicated on access having been available.(16)

In summary, the courts have not granted specific performance to landowners who have sought to compel a state highway commission to carry its original plans. This result makes sense if it is considered what would happen to the administration of state highway programs if changes in original plans could not be made.(17) Highway agencies negotiating with landowners for the conveyance of their land should nevertheless be aware of possible liability if the plans on which these negotiations are based are subsequently changed. Damages for mistakes and by way of inverse condemnation have been awarded which put the landowner and the highway commission in the position they would have enjoyed if the acquisition of the highway right-of-way had been based on the plans as they were finally adopted. Reliance damages based on fraudulent representations may also be awarded, and may greatly increase the cost of land acquisition.

Footnotes

1. State v. Hammel, 372 S.W.2d 852 (Mo. 1963).

2. State Highway Comm'n v. Utah Construction Co., 278 U.S. 194 (1929) (leading case).

3. Kansas Turnpike Authority v. Abramson, 275 F.2d 711 (10th Circ.1960); Harrison Construction Co. v. Ohio Turnpike Comm'n, 272 F.2d 337 (6th Cir. 1959).

4. Florida State Turnpike Authority v. Vankirk, 146 F. Supp. 364 (S.D.Fla. 1956). See Weyerhaeuser Co. v. State Roads Comm'n, 187 F. Supp. 766 (Md. 1960), for a summary of Eleventh Amendment diversity cases.

5. No case allowing specific performance or a mandatory injunction action against a turnpike commission has been found.

6. Board of Comm'rs of Canadian County v. Oklahoma State Highway Comm'n, 176 Okl. 207, 209, 55 P.2d 106, 109 (1936).

7. State v. Hammel, 372 S.W. 2d 852, 854 (Mo. 1963).

8. State ex rel. State Highway Comm'n v. Elliot, 326 S.W.2d 745 (Mo. 1959): dismissed action to enjoin highway commission and its contractor from constructing highway which obstructed village streets

9. See Nairn v. Bean, 121 Tex. 355, 48 S.W.2d 584 (1932) for a case in which the court failed to overturn a commission decision which was allegedly an abuse of discretion.

10. Paducah Box and Basket Co. v. Commonwealth, 344 S.W.2d 608 (Ky.1961).

11. Williams v. North Carolina State Highway Comm'n, 252 N.C. 722, 114 S.E.2d 782 (1960).

12. See Mandelker, Inverse Condemnation: The Constitutional Limits of Public Responsibility (1964).

13. Sheridan Drive-In, Inc. v. State, 16 App. Div. 2d 400, 228 N.Y.S. 576 (1962).

14. True recission would probably never be granted. In dicta, Fleming v. Noble, 111 Ohio App. 289, 294, 171 N.E. 2d 739, 743 (1959) suggested on remand that a prayer for cancellation of an easement given by the landowner, because the highway commission refused to construct access points, should be denied. Actual recission should be denied because of the possible magnitude of the loss to the state (appreciation of land values) and because there is an adequate remedy at law (inverse condemnation).

15. Sheridan Drive-In, Inc. v. State, 16 App. Div. 2d 400, 228 N.Y.S. 576 (1962), originated in a court of claims which does not have the power to grant an actual recission, but can only give damages.

16. Feuerborn v. State, 59 Wn.2d 142, 367 P.2d 143 (1961).

17. If specific performance of original plans were granted by the courts, a state would become ineligible for federal aid if it could not change its plans should this be necessary to meet federal specifications.