

VALIDITY OF EXCESS TAKING TO AVOID SEVERANCE DAMAGES

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Although in most highway condemnation cases the central issue is the amount of damages recoverable, there are a number of instances in which condemnees have challenged the condemnor's right to take, either on the basis that the taking is not for a recognized public use, or on the basis that even though a valid public use is involved, the desired land (or part of it) is not necessary for the project undertaken. Because the qualitative defense (that no public use attaches to a given taking) is one given by the federal (1) and most state (2) constitutions, it is regarded as a justiciable issue. Where quantitative considerations are concerned, however, the federal and most state constitutions are silent, impliedly leaving the determination of the extent of the exercise of the power of eminent domain to the discretion of the state highway authorities. In cases in which the landowner contends that more land is being taken than is necessary for a highway project, and a state statute expressly authorizes such excess condemnation, these two defenses appear somewhat intertwined.

In People v. Lagiss, (3) there was evidence that the California Department of Public Works (4) initially sought to acquire all of defendant's land for a state highway. During purchase negotiations, defendant asserted that a fraction (about 1/7) of the parcel was not needed for the project, and that he wanted to keep it. Although this fraction had some utility relating to the highway, in that it improved appearance, increased sight distance, and improved drainage conditions, the condemnor offered not to take it, provided that the condemnee waive his claim to severance damages.(5) When the condemnee refused to sign the waiver, a condemnation proceeding was started for the whole parcel. There was some evidence that the condemnor had intended to take the disputed portion and sell it to Contra Costa County for county road purposes, or to a private cemetery with restrictions on improvements.

At the trial, defendant argued that plaintiff's attempt to secure the waiver in exchange for not condemning the disputed portion constituted bad faith, an abuse of discretion, and was tantamount to coercion to compel a settlement on plaintiff's terms. The trial court found that no public use attached to the excess, accepting defendant's theory that if property is not needed for a public use, and fraud, bad faith, or abuse of discretion is pleaded and proved, such findings compel a conclusion that the taking is invalid.

In reversing the trial court, the appellate court held that the conclusive effect given by state statute (6) to the condemnor's determination of necessity precluded any judicial review of that issue, and that the only question was whether the condemnor was guilty of fraud, bad faith, and abuse of discretion in the sense that it did not intend to use the property for state highway purposes.

The appellate court also held that nothing in the record indicated that the Commission intended to put the excess to any other use than one related to the highway project. It added that even if such an intent had been proved, a California statute (7) validates the taking if the excess lies within a certain distance of the highway, as in this case. The court stated in dicta that a taking under California's excess condemnation statute is valid even if the evidence is "susceptible of the inference that plaintiff and the Commission, or either of them, did not, at the time of the acquisition of the disputed property or of the adoption of the resolution thereof, intend to use the disputed portion for the highway purposes resolved by the Commission, but to put it to a private use, (8)" so long as the statutory qualifications are met. (emphasis added).

The Necessity Issue

The general principle governing judicial review of the condemnor's determination that certain land is necessary for a highway project is that quantitative aspects of a public highway project are best left to the skilled technicians of the state highway departments, and that the courts should therefore refuse to intervene. (9) There are, however, two exceptions to this general rule. The first is that some state statutes, (10) and one state constitution, (11) expressly provide for a judge or jury decision on the necessity issue. The second exception, which is frequently stated but seldom applied, is that if the highway agency acts with fraud, bad faith, or in abuse of its discretion to condemn land not necessary for the highway, the courts will invalidate the condemnation, to the extent that it involves an unnecessary taking. (12)

This "bad faith" exception was thought to exist in California until a recent state supreme court case, People v. Chevalier, (13) disapproved language in prior California cases (14) which had recognized the exception. The Chevalier case held that the question of necessity is not reviewable under any circumstances, because of the conclusive effect given by state statute (15) to the condemnor's resolution of public necessity. This decision was based in part on the judicial policy that allowing review of necessity would result in endless litigation and delay, thereby thwarting the legislative purpose in making the resolution conclusive, and that damages would be

adequate to cover the landowner's loss. It should be noted, however, that the facts of the Chevalier case were quite different, in that it was not a case in which more land was being taken than was thought to be necessary. Instead, the landowner had questioned the basic plan of the highway authorities (under which the landowner lost access to a major street) by asserting that another route was more feasible.

Although the court in the Lagiss case appears to have been technically correct in following the Chevalier decision, the result deserves further scrutiny to test some of the propositions underlying its policy. Whether opening the necessity issue for judicial determination would in fact result in increased litigation and unnecessary harassment in highway condemnations is difficult to say with certainty. Some insight into condemnation trends is afforded by the annual reports of the American Bar Association's Committee on Condemnation and Condemnation Procedure, which show that between 1958 and 1964 an increase of more than three-fold occurred in the number of appeals annually taken in condemnation cases. This analysis is not sufficiently refined to permit comparison of specific issues on appeal, but it does appear to indicate that parties to condemnation proceedings are becoming more sensitive to the issues that are available for litigation. This general conclusion seems to be verified by the analysis of trial and settlement trends in Oregon condemnation cases from 1955 to 1963 recently made by Lindas.(16) The state of knowledge, however, is still inadequate to confirm or refute the fear of increased litigation if the necessity issue is made freely reviewable by the courts. Deeper analysis of the data concerning condemnation cases will be needed in order to evaluate this aspect of the California court's premise.

Equally beneficial would be deeper study of the question of whether judicial review would in fact be the best method of avoiding hardships due to administrative mistakes or arbitrariness in engineering judgment. It is arguable that if legislatures would provide more precise guidelines for applying the phrase "fraud, bad faith, and abuse of discretion", the courts might be able to play a more constructive role in avoiding hardships due to unnecessary takings for public use. Yet it is by no means sure that further legislative definition of the terms used in the law would make any significant difference in the trend of condemnation awards. Common law juries, even in the twentieth century, have frequently shown that they are remarkably sensitive to the relative bargaining positions of the parties in condemnation proceedings.

The Excess Condemnation Issue

Having decided that the California statute allowed the state to acquire more land than was strictly necessary to build its highway, the court still had the more subtle question of whether such acquisition was for a public purpose. The law frankly contemplated acquisition of land which would not be needed for the state's highway right-of-way and which might eventually be resold to private owners for restricted use. Where there is no necessity, can there be a public use?

Generally, statutes authorizing excess condemnation have had one (or a combination) of three bases of justification. The "remnant theory" permits excess taking in order to avoid leaving small fragments of land in sizes and shapes which make them unusable by their former owner. A sound economic consideration also supports the remnant theory since, in practice, when such remnants are left in private hands the condemnor often pays the full value of the property even though only a portion is taken. A second theory, the "recoupment theory", allows excess condemnation with the expectation that the condemnor may ultimately recoup part of the cost of the project by selling the excess. Recoupment of costs, however, is more of an incidental result than an initial justification for excessive taking, for clearly eminent domain policies do not contemplate that public agencies will systematically recoup the cost of condemnation at the expense of private landowners. Where recoupment enters into a case, it is likely to be one in which the landowner is initially willing to have his entire tract taken in this way. A third theory, the "protective theory", contemplates that the condemnor will take land adjacent to a public facility and subsequently resell it into private hands subject to use restrictions which would assure protection of the functional integrity of the facility or the amenities of the area surrounding it. Such condemnation has the same practical result as the direct acquisition of these protective rights in the form of easements or the direct imposition of restrictions under the police power. In practice, however, it has often proved easier to achieve these results indirectly through condemnation and resale.

Several decisions in the 1910's and 1920's established the judicial attitude hostile to statutes authorizing unnecessary condemnation. (17) The passage of constitutional amendments in several states, (18) and the evolution of new public demands and expectations regarding highway transportation systems, have, however, become the dominant factors in this area of legal thought. Under the impact of these influences courts are inclined to give public agencies the benefit of the doubt when examining the use to which the excess land may be put.

Does this mean that in California, and in other states specifically authorizing excess condemnation, a dissatisfied landowner has no hope of success in challenging the administrative use of the excess condemnation authority on the issue of lack of public use? One possibility may be to test the proposition under the United States Constitution on the issue of whether an excess taking is a violation of the due process guarantee of the Fourteenth Amendment. (19) To date, however, the U.S. Supreme Court has not availed itself of its opportunities to interpose due process as a bar to the taking of land not strictly needed for structures constituting a public project. (20)

Conclusion

The Lagiss case would seem to be a correct statement of California law under the state constitutional provision authorizing condemnation of marginal land beyond the amount needed for right-of-way. The decision, and the constitutional provision, represent an approach to eminent domain which has grown in strength as highway designers have been forced to design modern roadsides as well as modern roadways for contemporary highway systems.

Where no state constitutional authority for this excess condemnation exists, however, questions may be raised regarding both the precedent and logic of such action. Cases may be found to say that condemnation in excess of actual right-of-way need is unlawful as an attempt to exercise the eminent domain without a public use. In such states it would seem that if condemnation is invalid when it is openly acknowledged to be in fact excessive, it should follow that a taking which is in fact unnecessary, although not so labeled, should also be invalid. To treat the two cases differently would weaken the effect of the limitations imposed by the constitutional limitation of the rule requiring that eminent domain be used only for public purposes.

Two possibilities are suggested for maintaining a balanced view of the public use doctrine in states where administrative discretion otherwise would be accorded decisive weight by the law: First, it might be argued that the Fourteenth Amendment of the United States Constitution prohibits takings of property which are not necessary for public use. Second, landowners could receive protection against arbitrary or excessive use of condemnation if it were declared that the question of the necessity of the taking is a justiciable issue for the courts to decide as part of the condemnation proceeding.

The problem of maintaining balance among competing public and private interests in the use of land is, however, an increasingly difficult one as pressures of urbanization and industrialization mount.

Many areas face a relative shortage of land which has led both public planners and private developers to seek ways of preserving space for future growth or protecting their investments from development of undesirable surroundings. Criteria of desirability thus may become the criteria of necessity so far as public acceptance is concerned. What is considered excessive by one generation may not be considered excessive by another. One illustration of how the dimensions of the highway concept grow is furnished by the current proposals to increase efforts to preserve and enhance the natural beauty in highway corridors and increase roadside facilities for rest and recreation. Criteria for measuring the highway agencies' land needs in quantitative terms are presently in a formative state, and the development of qualitative criteria for recognizing these new features as a part of the public highway will surely have an effect on their formulation.

The questions of present necessity for a proposed taking and public use of the proposed taking are thus closely related. The question of whether necessity of taking should be a justiciable issue in condemnation cases may thus have more far-reaching consequences than are suggested by the factual setting of the Lagiss case. Which branch of government is best suited to be arbiter of the question of necessity should be decided according to which is best able to keep the law responsive to the currently changing concept of the functions that highways (and other public programs utilizing eminent domain) are expected to perform in the present and future years for which they are being built.

FOOTNOTES

1. "...nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V.
2. The usual state provision is similar to the Fifth Amendment of the United States Constitution, in requiring that condemnation be for a public use. See, e.g., Cal. Const. Art. I, §14; Mo. Const. Art. I, §26; Pa. Const. Art. I, §10.
3. 223 Cal. App. 2d 23, 35 Cal. Rptr. 554 (1963).
4. Under the California Streets and Highways Code, the Department of Public Works is the condemning body for state highway purposes. The condemnor cannot commence proceedings in eminent domain unless the California Highway Commission first adopts a resolution declaring that public interest and necessity require the acquisition in question. The Commission is a part of and adjunct to the Department, and is the quasi-judicial body which determines the matters required to be declared in the resolution. See Calif. Streets and Highways Code, §§70, 102.
5. Calif. Streets and Highways Code, §104.1, authorizes the acquisition of excess property. "Whenever a part of a parcel of land is to be taken for state highway purposes and the remainder is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damages, the department may acquire the whole parcel and may sell the remainder or may exchange the same for other property needed for state highway purposes." Although this statute appears to be designed for just the situation presented in Lagiss, it was not utilized, for reasons not disclosed in the opinion, although there was some indication that agents of the department had originally represented that their claim to the unneeded portion was derived from this statute.
6. Calif. Streets and Highways Code, §103, reads as follows:
"The resolution of the commission shall be conclusive evidence:
(a) Of the public necessity of such proposed public improvement.
(b) That such real property or interest therein is necessary therefore. (c) That such proposed public improvement is planned and located in a manner which will be most compatible with the greatest public good and the least private injury." The constitutionality of this statute was upheld in *Rindge Co. v. Los Angeles County*, 262 U.S. 700 (1923).

7. Calif. Streets and Highways Code, §104.3 provides: "The department may condemn...for reservations in and about and along and leading to any State highway...and may, after...completion of such improvement, convey...any...interest...acquired and not necessary for such improvement with reservations concerning the future use and occupation of such real property...so as to protect such public work and improvement and its environs and to preserve the view, appearance, light, air, and usefulness of such public work; provided, that land so condemned under authority of this section shall be limited to parcels lying wholly or in part within a distance of not to exceed one hundred fifty feet from the closest boundary of such public work or improvement; provided, that when parcels lying only partially within such limit of one hundred fifty feet are taken, only such portions may be condemned which do not exceed two hundred fifty feet from said closest boundary." (Emphasis added).
8. 223 Cal. App. 2d 23, at 42, 35 Cal. Rptr. at 566.
9. Rindge Co. v. Los Angeles County, 262 U.S. 700 (1923); New Jersey Highway Authority v. Currie, 35 N.J. Super. 525, 114 A. 2d 587 (App. Div. 1955); Solether v. Ohio Turnpike Comm'n, 99 Ohio App. 228, 133 N.E. 2d 148 (1954). See also 1, Nichols, Eminent Domain §4.11[1] (3rd ed. 1964).
10. The following statutes require that a judge or jury pass upon the question of necessity: Kan. Gen. Stat. §26-101 (1949); Mich. Stat. Ann. §8.174 (1958); Utah Code Ann. §78-34-8(1) (1953); Vt. Stat. Ann. Tit. 19 §225 (1959); and Wis. Stat. Ann. §32.07 (1964) (municipality).
11. Wis. Const. Art. XI, §2 (municipality; jury required to pass upon necessity).
12. United States v. Certain Real Estate, 217 F.2d 920 (6th Circ. 1954); United States v. 209.25 Acres of Land, 108 F. Supp. 454 (W.D. Ark. 1952); Woollard v. State Highway Comm'n. 220 Ark. 731, 249 S.W.2d 564 (1952); St. Joe Paper Co. v. Choctawhatchee Electric Coop., 79 So.2d 761 (Fla. 1955); Flower v. Billerica, 324 Mass. 519, 87 N.E.2d 189 (1949); Ervin v. Mississippi State Highway Comm'n, 213 Miss. 885, 58 So.2d 52 (1952); Sease v. City of Spartanburg, 242 S.C. 520, 131 S.E.2d 683 (1963); Southern Ry. v. State Highway Dept., 219 Ga. 435, 134 S.E. 2d 12 (1963).

13. 52 Cal. 2d 299, 340 P.2d 598 (1959), noted, 48 Calif. L. Rev. 164 (1960).
14. Orange County Water Dist. v. Bennett, 156 Cal. App. 2d 745, 320 P.2d 536 (1958); City of La Mesa v. Tweed and Gambrell Planing Mill, 146 Cal. App.2d 762, 304 P. 2d 803 (1956); People v. Schultz Co., 123 Cal. App. 2d 925, 268 P.2d 117 (1954); People v. Thomas, 108 Cal. App.2d 832, 239 P.2d 914 (1952); People v. Milton, 35 Cal. App. 2d 549, 96 P 2d 159 (1939).
15. See note 6, supra.
16. Lindas, L., "Analysis and Evaluation of Oregon Condemnation Cases", Highway Research Record No. 54 (Highway Research Board, Washington, 1964), pp. 31-35.
17. The following cases have held state excess condemnation statutes to be unconstitutional, under conventional state constitutional provisions regarding public use: Cincinnati v. Vesper, 33 F.2d 242 (6th Cir. 1929) (recoupment theory); Salisbury Land and Imp. Co. v. Commonwealth, 215 Mass. 371, 102 N.E 619, (1913) (recoupment theory); Pennsylvania Mutual Life Ins. Co. v. Philadelphia, 242 P. 47, 88 Atl. 904 (1913) (Protective theory); Richmond v. Carneal, 129 Va. 388, 106 S.E.403 (1921) (remnant theory).
18. Cal. Const., Art. I, §14-1/2 (similar to statute quoted in note 6, supra). Other state constitutions authorizing excess condemnation include: Mass. Const. Part I, Art. 10; Mich. Const. Art. XIII, §5; N.Y. Const. Art. I, §7; Ohio Const. Art. XVIII, §10; Pa. Const. Art. XV, §5, Wis. Const. Art. XI, §3b.
19. For an extended discussion of this question, see note, The Constitutionality of Excess Condemnation, 48 Colum. L. Rev. 108 (1946). See also, generally: 2 Nichols, Eminent Domain, (3d edition, 1963), §7.5122 and Steiner, "Excess Condemnation", 3 Mo. L Rev. 1 (1938). See also, Highway Research Board, Roadside Development and Beautification: Legal Authority and Methods, Part I, (Washington, 1965), pp. 20-35.
20. E.g., Rindge Co. v Los Angeles, 262 U.S. 700 (1923); Berman v Parker, 348 U.S. 26 (1954)