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LAND ACQUISITION MEMORANDUM #172

A SUPERIOR COURT OF DELAWARE RULES LANDOWNERS NOT ENTITLED TO INCREASE IN VALUE OF PROPERTY TAKEN AFTER OPEN AND NOTORIOUS DESIGNATION OF THE PROBABLE AREA OF CONDEMNATION

Twenty-three cases which involved condemnation of property for the portion of the Federal Interstate System in Delaware - known as the "Kennedy Turnpike" - were consolidated for trial. In accordance with a pretrial order, the Superior Court of the State of Delaware in and for New Castle County was requested to establish the "cutoff date" for evaluating the property taken.

The superior court wrote a memorandum decision dated July 13, 1965, in the case of State ex rel. State Highway Dep't v. 62.96247 Acres of Land, being Civil Action No. 947, 1961. However, it was noted that there was no contemplation that the lengthy opinion would be reported. It was prepared only for whatever benefit it might be to the parties and counsel, and those trial judges who might be called upon at a later time to try the cases. The court also stated that the opinion might be of value to the Supreme Court of Delaware in the event an appeal - which seemed quite possible - was taken from its rulings.

The superior court found, with some few exceptions, that the areas involved were undeveloped agricultural and vacant lands, some under cultivation, but mostly uncultivated; some woodlands; some marshlands; some lowlands - all of which might be generally described as "hinterland" and over which the turnpike had been constructed, and which areas were "opened up" by this turnpike.

The court noted that before the Federal Interstate Highway Act was enacted in June of 1956, the Delaware State Highway Department and the Interstate Division thereof had undertaken certain activities which were aimed at the construction of a new connection between the Delaware Memorial Bridge and the Delaware-Maryland State line for the handling of the heavy traffic already generated - which was then being handled by Routes 13 and 40 - and the continued expected increase in such traffic. One plan was considered, and a feasibility report made for the construction of such a road from revenues gained by refinancing existing bridge bonds and repaying the bonds by toll collections. Negotiations were commenced with the Maryland Roads Commission and the Federal Bureau of Public Roads to determine connecting locations between the Delaware and Maryland roads.

Upon passage of the Federal Law mentioned above, which provided for 90 percent Federal funds in the construction of approved roads, the toll road plan was completely abandoned and the highway department began preparing a plan which would qualify for the "attractive" 90 percent Federal program. Such activity directed attention to the potentials of the area in what is now the "Turnpike" area and no doubt generated some curiosity and interest in such an overall project, with some resulting value enhancements. The chief engineer of the department announced within a month of the passage of the Federal legislation that construction would begin under the 1956 Federal Act on a road "from Iron Hill . . . to the Bridge" in the Spring of 1957. An engineering firm was immediately hired to recommend and "justify" an alignment. Approval was obtained by the Bureau of Public Roads for the "control points" for the road (known as FAI-1) and meetings were arranged with the Bureau of Public Roads to gain a knowledge of the necessary procedures under the Federal Law. The official approval by the Bureau of the alignment was made in stages - the last date being on May 10, 1957.

Notice of the public hearing that was required was first dated January 28, 1957, and was released to the press on that date. The first press notice of the public meeting on the proposed route, however, was not published until February 5, 1957. Approximately 500 people attended the public meeting which was held on February 19, 1957. The chief engineer again announced that the construction would begin in the spring of 1957 and the road would be completed by 1959. He stated that although an alignment had been chosen "the final line has not yet been determined" and the "location of the line is not intended to be such that it is a final pinpointed location on the ground . . ." He further stated that "It is impossible for me or anybody else right now to say that we're going to miss or take somebody's house, somebody's farm or some other piece of property, because we feel that the line is general enough so that it can be varied as much as, well, perhaps five hundred feet . . . ."

The completion of maps with delineation of actual property to be acquired and the boundary lines of property of owners who might be affected were made available by October 30, 1957 to the highway department. Beginning about this time, the department and the consulting engineers commenced the actual field work of staking the center line of the proposed alignment, acquiring properties along the right-of-way, and awarding contracts. The work of staking the center line of the proposed alignment consisted of setting copper weld points - small concrete and copper squares, flush with the ground surface - at 2,000-foot intervals on the alignment, and driving oak hubs with small, red rags attached every 500 feet between these points. Even though some of the markers went through heavily wooded and thickly brushed terrain so that some of them might not have been fully visible from any appreciable distance, the court stated that the landowners along the alignment were well aware of the announcement of the project and impending construction of the expressway and its likely route from the Bridge to the Maryland line - all this before January 1, 1958.

The court pointed out that there was no legal requirement of any precise acts or line of conduct relating to the project to constitute "notice" or "announcement" of such project. A turnpike which ultimately involved the expenditure of something in excess of $28,000,000 was not conceived, planned

and completed overnight or within a short time. Whatever was done by the department in initiating and/or furthering the project went ultimately to the determination that an "announcement" was made of the project. The court, therefore, made findings that:

(1) by January 1, 1958, the center line of the expressway had been designated by State highway department engineers and surveyors by the placement of stakes and flags every 500 feet or less, along the entire center line of the alignment from the Delaware Memorial Bridge to the Maryland State line;

(2) by January 1, 1958, the State highway department and the Federal Bureau of Public Roads had officially authorized, and were committeed to, the construction of an expressway along that alignment from the Bridge to the Maryland State line;

(3) by January 1, 1958, it was generally known to the public, as the result of the public hearing, newspaper publicity and the staking of the center line of the alignment of the expressway that a limited access express highway, the right-of-way for which would be approximately 300 feet wide, was to be constructed along the center line;

(4) each owner of land in the alignment of the expressway or abutting property owners thereon and prospective purchasers thereof knew, or from what was obvious to them, they should have known, that such property or a portion thereof was in the path of and would be needed for the express highway; and

(5) the location of the center line had not changed materially since January 1, 1958, and it marked the route of what was now known as the Turnpike.

In November 1959, the chief engineer of the department recommended to the department that it give consideration to the construction of a toll road between the Delaware Memorial Bridge and the Maryland Line. While investigation of the possibilities of toll road financing was under consideration, construction of the expressway, as approved by the Bureau of Public Roads, was held up. On August 24, 1961, the Delaware Turnpike Enabling Act, which primarily related to and concerned a means of financing the project through revenue bonds was passed. However, prior to the sale of the Turnpike Revenue Bonds on February 20, 1962, the department did not have adequate funds at hand and available to continue with the construction of the expressway, which was now to be called the Delaware Turnpike. After that date, the Federal Government was reimbursed for work done on the turnpike before it became a toll road and hence ineligible for Federal funds.

The superior court ruled that January 1, 1958, had to be used as the cut-off date for evaluating the properties involved. It stated that the rule in the case of United States v. Miller, 317 U.S. 369 (1943) was controlling since the Delaware Supreme Court had adopted that rule in the case of State v. Botluck, 200 A.2d 424 (1964). In the Miller case, the Supreme Court of the United States stated:

> If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the project improvement.
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> 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 condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities.
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> . . . If . . . the respondents' lands were, at the date of the authorizing Act, clearly within the confines of the project, the respondents were entitled to no enhancement in value due to the fact that their lands would be taken. If they were within the area where they were likely to be taken for the project, but might not be, the owners were not entitled, if they were ultimately taken, to an increment of value calculated on the theory that if they had not been taken they would have been more valuable by reason of their proximity to the land taken. . . .

The superior court in Delaware noted that the United States Supreme Court definitely ruled that a property owner in a condemnation case was not entitled to recover any increase in value, arising after the authorization of a public project, "attributable to the announcement of, plans for, or the construction of" the project and the date of taking. The superior court stated that it could be accepted that the Miller case stood as the leading case which had taken the view that the mere probability, without certainty, that the lands in question would be taken for a public project, precluded the right to recover for an enhancement in land values occasioned by or due to announcement of, plans for, or construction of the project, between the time of authorization of the project (at the latest) and the date of taking under the power of eminent domain. The rule in Miller is clearly based upon the probability or likelihood - not certainty - that the property would be taken.

Since the owners were not to be paid any enhancement in value of the property occurring after January 1, 1958, the superior court ruled that sales of property similar to that taken for the turnpike, which were made subsequent to that date, had to be excluded since such sales prices were undoubtedly affected by the pending construction of the turnpike.

Each argument used by the landowners involved in the cases for the purpose of proving that they were entitled to any appreciation in value of their property to the date of taking (rather than only to January 1, 1958) was rejected by the superior court. The landowners wanted to divorce the expressway, formerly known as FAI-1 which was entitled to 90 percent Federal funds, from what later became the toll road turnpike. The court stated that there was little, if any difference - besides the names - between the two, except the method of financing. It was and always had been factually one project. There were some minor modifications of design after the name Turnpike was adopted. But the court found the evidence was clear and convincing that the center line of the alignment of the project had remained the same since the end of 1957, and that by January 1, 1958, announcement had been made that an expressway 300 feet wide was in contemplation and would be constructed, whether under the name of FAI-1 or Expressway or Delaware Turnpike. Except for the method of financing the construction of the highway it was misleading and wholly contrary to the facts to seek to make a distinction between FAI-1 and the turnpike. By January 1, 1958, there was "open and notorious designation of the probable area of condemnation /which/ is necessary before the /Miller/ rule can be applicable."

The owners contended that the delay encountered in obtaining the needed financing to proceed to construct and complete the project, since the revenue bonds for the turnpike were not sold until February 20, 1962, was a reason for the court to delay finding the cutoff date when the Miller rule was to be applied. However, the court held that delay in getting financing to go forward to complete a theretofore designated public project did not affect the applicability of the Miller rule or increase a landowner's right to compensation for his land by reason of delay. The court stated that in applying that rule, the date of the decision of an administrative agency in determining what land was to be included within the area of the public project was just as reliable as reference to a legislative act or to an executive's approval thereof. All that was necessary was "open and notorious designation of an area within which the development could probably occur." If it was true, as the owners contended, that courts usually ruled that an owner was to be paid the value of his land as of the date of a legislative enactment, it was probably because the legislation was the date of authorization. The court stated that it was not so restricted in the cases at bar because the highway department had long had the authority to do what was done here. No case that the court had found had stated that providing of the financial means to complete a development or a project was the critical date and should guide the application of the Miller rule.

The landowners also argued that it was unfair to award them less than the value of surrounding land. They wanted to know why one landowner should bene-

fit since his land was not taken but the persons whose lands were condemned were not benefited. The court remarked: "This is like asking why should one person win the Twin Double at a race track and not some other person or persons." It stated that if the courts eliminated enhancement in value caused by factors unrelated to the project, it could agree that such a determination of "just compensation" might be unfair. This, however, was not the case. It pointed out that it must be realized and emphasized that a landowner would not have benefited from any enhancement disallowed if the Government did not build its project and the owner continued to own his property. Where there was nothing, there now is nothing. Under the Miller rule if only some people benefited and the increase in value resulted from governmental action, the landowner had suffered no loss. Indirectly, the Government was giving a profit to one or more landowners, but it was not taking anything away from the others. The owner could buy a parcel of equal value somewhere else.

The court went on to point out that in Nichols Law of Eminent Domain, 3d Ed., Vol. 3, Sec. 8.61, it is stated that:

> The just compensation to which an owner is entitled when his property is taken . . . is regarded in law from the point of view of the owner and not of the condemnor. . . . just compensation in the constitutional sense is what the owner has lost and not what the condemnor has gained.

A person might wish that his land was left, but he still was receiving its worth if the Government had not undertaken and proceeded with the public improvement. He hasn't been injured by the public project, although he had been denied the "enhancement in value" which other landowners could get.

The court further stated that part of the argument as to unfairness was based on objections that really had no substance because - contrary to the fears of some - all enhancement in value unrelated to the Government project, such as enhancement resulting from normal economic growth in the years following World War II to the end of 1957, was allowed and not all enhancement due entirely to the project was disallowed. (It was known prior to January 1, 1958, that a highway was going to be constructed and land values in the area increased before that date.) In addition, if the project was one which caused a depreciation in value, any such depreciation was usually eliminated.

The court summed up this point by stating that the value to be recovered was that which the land would bring in the market place under ordinary conditions and absent enhancement in value resulting from announcement of, or the initiation of the public project. It stated there was no unfairness in this because the compensation which was legally due and payable was as much or more than one had the right to expect if the public project had not been announced and constructed. No loss was sustained. Instead, it would be unfair to the public if an owner were allowed to recover significant increases of enhancements in value resulting solely because the Government took some or all of his land otherwise not increased in value to construct the public project. Even here, the scales were further weighted in favor of the landowner, by the fact

that he was allowed to recover for increases caused by selection, discussion of and agitation for the project up to the time his land was probably included within the scope of the project. Also where there was a partial taking only, the landowner was usually greatly benefited by the extra value given to the land which was not taken.

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