EMINENT DOMAIN: VALUATION WHERE PROPERTY USE RESTRICTED BY DEED

Board of County Comm'rs v. Thormyer
169 Ohio St. 291, 159 N.E.2d 612 (1959)

A portion of land held by county commissioners by virtue of a deed executed to them in 1914 was appropriated by the Acting Director of Highways for use as a limited access relocation and improvement of a state route. The fee simple title was conditioned upon the continued use of the land as a children's home, with a reversionary interest in the grantor for breach of these restrictions. The common pleas court awarded compensation and damages based on evidence as to the land's use for commercial purposes, a position subsequently affirmed by the court of appeals. The Ohio Supreme Court, in reaffirming this decision, held that an award based on value for commercial purposes is valid, notwithstanding that the land was held under a deed containing restrictions against using the land for purposes other than as a childrens home.[1]

The terms "property," "land" and "interest" are often used interchangeably, but they may convey widely differing meanings.[2] In analyzing the present decision, those distinctions must be kept firmly in mind. It is necessary in any eminent domain proceeding to recognize (1) what interest it is that the state is acquiring in the land,[3] (2) whose interests are affected thereby, and (3) that the question of valuation of the land and the question of whose interests are affected thereby are distinctly separate, though interrelated, problems.

The supreme court ascribes its decision to three basic arguments: compensation should be based upon what the land is worth and not the value of the ownership interest of a particular party; as between owner and appropriator, the former should be allowed the benefit of any resulting windfall;[4] the grantor's intent would have directed the result reached in this case.[5]

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[1] Board of County Comm'rs v. Thormyer, 169 Ohio St. 291, 159 N.E.2d 612 (1959).

[2] For purposes of this note, use of the word "land" will refer to the physical substance. "Property" and "interest" both refer to the aggregate of rights which the owner has in the land. Although not applicable to every case cited, this usage seems to be generally consistent with the language employed by the court in the instant case.

[3] In condemnation proceedings by the state highway director, a perpetual easement is acquired by the state. Ohio Rev. Code § 5501.11 (1953).

[4] The reasoning employed by the court on this point seems to disregard its first argument entirely. The concept "windfall" is predicated, in the words of the court, upon the difference between the market value of the property and "what the property was worth to him." The latter measure is nothing but that previously rejected measure, the value of the ownership interest of a particular party.

[5] Although plausible, this position necessitates constructing an intent for the grantor when none is expressed and possibly never existed. A related consideration is what restriction, if any, may be placed upon the award granted to the holder of the

A proceeding for the condemnation of private property for public uses is a proceeding in rem[6] and not in personam. The proceeding in court is one for the ascertainment of the amount of compensation to be paid for the land appropriated.[7] In the present case, there is more than one party with an interest in the land. The restriction upon use gives rise to a division of ownership.[8] Although the incidents of ownership are divided, condemnation by the state results in damage to the entire fee, affecting both the reversionary and the commissioner's interests. Where there are several interests in a single piece of land, the general rule is that the value of such land is determined in gross, and the award is then apportioned among the various claimants.[9]

The compensation required by law[10] to be paid when land is taken for public use is that sum of money which will compensate the owner or owners for their fee or lesser estate in the land actually taken or appropriated, that is, the fair market value of the land taken.[11] When, as in the instant case, the condemnation proceeding affects not merely the "restricted tenure,"[12] but also the possibility of reverter, it seems clear that the restrictive conditions may be disregarded in the ascertainment of a just compensation. Having affected all the interests in the land without restriction as to its use, the state must pay compensation evaluated not with reference to what the property is worth for any particular use, but for what it is worth generally for any and all uses for which it might be suitable, including the most valuable

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defeasible title. The amount has sometimes been placed in trust to accomplish a purpose intended by the grantor. *In re* County of Westchester, 243 App. Div. 707, 277 N.Y.S. 988 (1935).

[6] Scott v. Columbus, 109 Ohio St. 193, 142 N.E. 25 (1923), *cert. denied* 265 U.S. 580 (1923), *error dismissed for want of jurisdiction,* 269 U.S. 528 (1925); Martin v. Columbus, 101 Ohio St. 1, 127 N.E. 411 (1920); Portage County v. Gates, 83 Ohio St. 19, 93 N.E. 255 (1910); Cupp v. Seneca County, 19 Ohio St. 173 (1869).

[7] Thormyer v. Irvin, 170 Ohio St. 276 (1960); Grant v. Hyde Park, 67 Ohio St. 166, 65 N.E. 891 (1902); *overruled on another ground* in Cincinnati v. Shuller, 160 Ohio St. 95, 113 N.E.2d 353 (1953); 19 Ohio Jur. 2d "Eminent Domain" § 148 (1956).

[8] The authorities cited by the court, 169 Ohio St. at 295, are distinguishable in that the covenants giving rise to the restrictions in those cases made no provision for reversion to the grantor.

[9] Thormyer v. Joseph Evans Ice Cream Co., 167 Ohio St. 463, 150 N.E.2d 30 (1958); Queen City Realty Co. v. Linzell, 166 Ohio St. 249, 142 N.E.2d 219 (1957); Sowers v. Schaeffer, 152 Ohio St. 65, 87 N.E.2d 257 (1949); 19 Ohio Jur. 2d "Eminent Domain" § 119 (1956).

[10] Ohio Const. art. 1, § 19.

[11] Muskingum Watershed Conservancy Dist. v. Funk, 134 Ohio St. 302, 16 N.E.2d 454 (1938); Powers v. Hazelton & L.R. Co., 33 Ohio St. 429 (1878); Dodson v. Cincinnati, 34 Ohio St. 276, *affirming* 7 Ohio Dec. Rep. 504 (1877); Giesy v. C.W. & Z. Railroad Co., 4 Ohio St. 308 (1854); *In re* Appropriation of Easement for Highway Purposes, 93 Ohio App. 179, 112 N.E.2d 411 (1952), *dismissed for want of debatable question,* 158 Ohio St. 285, 109 N.E.2d 3 (1952).

[12] This is the characterization of the commissioners' property interest employed by the court.

uses to which it can reasonably and practically be adapted.[13] *Sowers v. Schaeffer*[14] held that valuation could be based on the most valuable uses to which the land can "reasonably and practically be adapted."

Although his interest is damaged by the condemnation, a person holding the possibility of reverter frequently will not be held entitled to a share of the award because of the impossibility of performance of a condition as to the use of the premises or because the reversionary interest is deemed to be so slight as not to admit of compensation.[15] The usual procedure in cases of the present nature is the ascertainment of damages and compensation for the condemnation as though the estate were a possessory estate in fee simple absolute and an award of the entire amount to the owner of the estate in fee simple defeasible.[16] However inconsistent this practice may seem when compared with the previously discussed method of valuation, the award itself should not be affected because, as the court notes in its opinion, "the determination of the extent of those interests of ownership is a matter of no concern to the appropriator of the property or to the jury called upon to determine the amount of the award."[17]

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[13] Sowers v. Schaeffer, *supra* note 9; Cincinnati & S. Ry. v. Exrs. of Longworth, 30 Ohio St. 108 (1876); Goodin v. Cincinnati & W. Canal Co., 18 Ohio St. 169, 98 Am. Dec. 95 (1868); 19 Ohio Jur. 2d "Eminent Domain" § 122 (1956).

[14] Sowers v. Schaeffer, *supra* note 9.

[15] United States v. 2,086 Acres, 46 F. Supp. 411 (W.D. S.C. 1942); United States v. 1,119.15 Acres, 44 F. Supp. 449 (E.D. Ill. 1942); First Reformed Dutch Church v. Croswell, 210 App. Div. 294, 206 N.Y.S. 132 (1924), *appeal dismissed* 299 N.Y. 625, 147 N.E. 222 (1925); Cincinnati v. Babb, 4 Ohio Dec. 464 (1893); Restatement, "Property" § 53, comment *b* (1936). But see United States v. 2,184.81 Acres, 45 F. Supp. 681 (W.D. Ark. 1942); Cincinnati v. Smythe, 570 Ohio App. 70, 11 N.E.2d 274 (1937); Restatement, "Property" § 53, comment *c* (1936).

[16] United States v. 1,119.15 Acres and United States v. 2,086 Acres, *supra* note 15.

[17] 169 Ohio St. at 297.