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Depreciation Damages in Eminent Domain Proceedings

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RECENT TRENDS in constitutional law relating to criminal matters have brought about a new awareness of the dilemma in which the law finds itself when individual rights come into conflict with the state's. The horns of this dilemma are familiar to anyone concerned with the law of eminent domain. In fact, the reconciliation of public and private interests is the heart of eminent domain law. Usually, the role of the courts is to protect the individual property owner's rights in a given situation, the supposition being that the government (or other appropriating authority) is big enough to fend for itself. Such a role is becoming increasingly important in this age of urban renewal, Interstate Highway programs and other public projects which involve public acquisition of private property.

As in the field of criminal procedure, the individual's right in eminent domain proceedings are spelled out by the United States Constitution—specifically, Amendment V, which provides that private property shall not be taken for public use without just compensation.[1] Of course, the seeming simplicity of this constitutional provision belies the complexities involved in its application. For example, it is well settled that "just compensation" for a given piece of property must be measured in terms of the fair market value of that property.[2] But market values of real estate are apt to fluctuate even under normal conditions, and their behavior when a public acquisition is in the offing can be chaotic.

For example, if the proposed public project will benefit an area (*e.g.*, urban renewal), property values are likely to increase.[3] On the other hand, if the project will be a detriment to the area (*e.g.*, a town dump), values will decrease.[4] And when it is known that specific parcels will definitely be taken for the project, a *vicious circle* effect takes place in which the fair market value is based on the contemplated award, which in turn is to be based on the fair market value.[5] The problem the

* B.A., Ohio State Univ.; Second-year Student at Cleveland-Marshall Law School.

1 U. S. Const., Amend. V.

2 Nichols, Eminent Domain, § 12.1 (6), (4th ed. 1962); and see illustrative cases in, Oleck, Cases on Damages, 769-790 (1962).

3 Glaves, Date of Valuation in Eminent Domain: Irreverence for Unconstitutional Practice, 30 U. Chi. L. Rev. 319 at 327 (1963).

4 Jahr, Eminent Domain Valuation and Procedure 130, § 93 (1963).

5 Rhode Island Hospital Trust Co. v. Providence County Courthouse Commission, 52 R.I. 186, 159 A. 642 (1932). Shreveport Traction Co. v. Svara, 133 La. 900, 63 So. 396 (1913). See Orgel, Valuation Under Eminent Domain 450, § 105 (1953); Oleck, Damages to Persons and Property 409 §§ 219-227 (1961 rev. ed.).

courts face is in harnessing these economic forces in such a way that the individual property owner's rights will be safeguarded. This note will examine how the courts have dealt with depreciation in general, and depreciation when a "full taking" is involved in particular.

When Will Depreciation Be Compensated?

Naturally, the government cannot be expected to compensate owners for the general depreciation of property values in the vicinity of a public improvement.[6] To do so would render the costs of said project prohibitive. In order for a compensation award of any character to be made, the land involved must be "taken" (which generally means that the owner is substantially ousted from and deprived of all beneficial use of the land affected) [7] or damaged,[8] (which entails physical disturbance of a public or private property right which gives the property an additional value, and by reason of which disturbance the property owner sustained a special damage in excess of that sustained by the public generally).[9]

Once part of the property is taken or damaged, the door is open for compensation for depreciation of the remainder. These are the so called "partial taking" cases. There must be a definite physical relation between the part or right taken and the property which is depreciated, in order to allow damages for the latter. For example, if the owner has two lots, A and B, lying on opposite sides of a road, and a railroad bisects lot A, the owner may not be able to collect damages for the injury done to B, even though A and B are integral parts of a single farm enterprise.[10] Damages to the remainder in partial taking cases are determined by one of three formulas: (1) They may be included in assessing the value of the part taken; (2) The owner may be awarded the value of the part taken plus damages to the remainder; and, (3) He may be given the difference between the fair market value before and after the taking.[11] Of these three formulas, the second is the one most often used.

The rule that some property right must be taken or damaged in order to entitle the owner to any compensation produces some eyebrow-

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[6] Frazer v. Chicago, 186 Ill. 480, 57 N.E. 1055 (1900); State ex rel. Ohio Turnpike Commission v. Allen, 158 Ohio St. 168, 107 N.E. 2d 345 (1952), cert. den. sub nom. Balduff v. Ohio Turnpike Commission, 344 U.S. 865 (1952).

[7] 26 Am. Jur., *Eminent Domain,* § 157; Northern Transportation Co. v. Chicago, 99 U.S. 635 (1878); Pumpelly v. Green Bay & M. Canal Co., 13 U.S. 166 (1871).

[8] In 1870, Illinois amended the compensation provision of its Constitution to read, "Private property shall not be taken *or damaged* for public use without just compensation," Ill. Const., Art. 2, § 13. Several other states followed suit.

[9] Alabama Power Co. v. Guntersville, 235 Ala. 136, 177 So. 332 (1937).

[10] Orgel, Valuation Under Eminent Domain 229, § 47 (1953); Oakland v. Pacific Coast Lumber, 171 Cal. 392, 153 P. 705 (1915).

[11] Orgel, *op. cit. supra* note 10, pp. 226-236, § 47-51.

raising if not clearly inequitable results. For example, the construction of a viaduct in a Texas city caused substantially the same depreciation in value to two neighboring property owners. Owner A was compensated and owner B was not. The rationale given was that owner A was deprived of all reasonable access and owner B retained some access even though B's access was impaired.[12]

Full Takings: The Problem

Thus, when there is no taking, depreciation in value is *damnum absque injuria.* When there is a partial taking, it is compensated. These rules are fairly well settled. What is unsettled, however, is the problem of depreciation when a full taking is involved. Stated simply, the problem is whether or not the law should compensate property owners for the depreciation which is caused by the taking, but which occurs before the taking. The problem is a direct result of two factors: One is a fact of life and the other is a rule of law.

The fact of life is, as was mentioned above, that knowledge of impending eminent domain proceedings can depress property values in an area. Professor Donald W. Glaves calls this phenomenon "planning blight." [13] It is caused by a variety of factors which will be examined below.

The rule of law probably the most solidly entrenched in eminent domain valuation (save the "fair market value" rule), is that damages to the landowner are to be assessed *as of the date of taking*[14] (or "date of take" as it is called in Ohio).[15] This rule arose from the necessity to freeze fluctuating market values at a definite date. The rule is plagued, however, by that age old legal paradox that hard and fast standards can be at the same time necessary and futile.

The date of taking generally is defined as some stage of the legal proceeding in which compensation is determined. In federal law, it is the date at which a "declaration of taking" is filed by the government and the estimated amount of compensation is deposited with the court.[16] In other jurisdictions it may be the date of summons,[17] date of a county

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[12] Adams, Diminution of Property Value is Compensable When a Property Owner has been Deprived of All Right of Access for a Public Use, But the Same Diminution is Damnum Absque Injuria if Reasonable Access Remains, 4 Houston L. Rev. 120 (1966).

[13] Glaves, *op. cit. supra* note 3 at 322.

[14] Colaluca v. Ives, 150 Conn. 521 at 531, 191 A. 2d 340 (1963); In re Board of Water Supply of City of New York, 227 N.Y. 452, 14 N.E. 2d 789 (1938); Barnes v. Peck, 283 Mass. 618, 187 N.E. 176 (1933).

[15] Ohio jurists are said to distrust use of the gerund.

[16] Declaration of Taking Act, Sec. 1-5, 40 U.S. Code Annot., Sec. 258a-258c.

[17] Calif. Code Civ. Proc., §§ 1243, 1249; Lansburg v. Market Street R. Co., 98 Cal. App. 426, 220 P. 2d 423 (1950); Ariz. Code 1939, § 27-916.

court order condemning the land,[18] or date of the filing of eminent domain proceedings[19] or the date of trial.[20]

The date of taking can, however, be the date at which the government enters into possession if this occurs prior to the statutory date.[21] Thus, there is usually a time lag between the time when the proposed project begins affecting property values and the date of taking as defined by law. If the property has depreciated, the owner may well be left holding the bag, and the appropriator in the enviable position of being able to deliberately delay the taking, and thus take advantage of the depressed values.

Of course, the land may have appreciated during this time lag. In such a case, the law is fairly well settled: The court must assess damages without regard to enhancement in value caused by the public project.[22] The recovery of such value would be an undeserved windfall to the property owner. But a loss caused by depreciation is similarly undeserved by the landowner. Why then is the rule for depreciation not well settled consistently with the rule for appreciation?

The reason is that any appreciation in value caused by the public project is likely to be economic rather than physical; that is, caused by a general increase in demand in the area as opposed to actual physical improvement of the property. If physical improvements are made, they are likely to be made by the owner—not the appropriator or any third person. The government is not in the habit of putting new roofs on houses it intends to demolish. Depreciation, or planning blight, on the other hand may be caused by a combination of economic and physical factors. Demand for property in the area drops, and at the same time tenants move out, vandals and vermin move in, and structures are allowed to deteriorate.

With regard to purely economic depreciation, the courts have refused to compensate, because to attempt to do so would "involve the government in unfathomable speculation." [23] When physical depreciation is involved, however, the problem gets sticky. At first blush, the solution seems simple: the depreciation was caused by the project, so

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[18] Ark. Stat. § 76-510, 76-917.

[19] Fla. Stat. Annot., § 73.01.

[20] 19 Ohio Jur. 2d 535.

[21] U.S. v. Anderson, 179 F. 2d 281 (5th Cir. 1950); Board of Education of Cleveland City School District v. Hecht, 102 Ohio App. 521, appeal dism. 165 Ohio St. 200 (1955); Application of Westchester County, 127 N.Y. Supp. 2d 24, 204 Misc. 1031 (1953).

[22] Kerr v. Park Commissioners, 117 U.S. 389 (1885); Shoemaker v. United States, 147 U.S. 282 (1893). A small minority holds the opposite view: see, Hard v. Housing Authority of the City of Atlanta, 219 Ga. 74, 132 S.E. 2d 25 (1963).

[23] Atchison, Topeka and Santa Fe R. Co. v. Southern Pacific Co., 13 Cal. App. 505, 57 P. 2d 575 (1936); U.S. v. Certain Lands in Town of Highlands, 47 F. Supp. 934 (S.D.N.Y. 1942).

the appropriator should compensate. The situation is complicated, however, by the fact that the actual acts which physically depreciated the property may have been done not by the appropriator, but by vandals, administrative agencies (other than the one doing the appropriating) or even the owner himself. Thus, a problem of culpability, or "proximate cause" as it would be called in tort law, arises.

Because of the above considerations, the law dealing with the problem of depreciation is unsettled. The courts have compensated in some cases and refused to compensate in others.

Compensation Denied

In the cases in which compensation is denied, the courts have shown their concern for the problem of culpability. Usually, the landowners in these cases (1) ask for a date of valuation earlier than the date of taking, and/or (2) ask the court to construe some act of the appropriator which led to the depreciation as a "taking." With regard to (1), the courts refuse to stray from the established rule. With regard to (2), they may accept something less than an entry into possession as being a "taking," but it must be some actual physical invasion by the appropriator. In this way, the courts make sure that the appropriator does not pay for something that someone else has done.

Thus, the Texas Supreme Court said in *State v. Vaughn*[24] that:

> The mere fact that tenants learn of contemplated condemnation and because of such information elect to vacate property does not afford the owner the right to receive damages from the state, since there has been neither a taking nor any character of physical invasion of the property.

The Illinois court went along with this decision when there was vandalism as well as vacancy involved.[25]

In *In Re Elmwood Park Project*,[26] the city actually sent letters to the tenants telling them to move out, filed *lis pendens* and permitted intense building inspection and citations against the owner. The court conceded that these actions constituted a taking, but pointed out that lax police protection, and reduced refuse collections, street cleaning and street repair would not constitute a taking absent proof of specific directives by city officials for the purpose of reducing the value of the properties.

Research Associates, Inc. v. New Haven Redevelopment Agency[27] presented another case of interference by the city, but in this case it was

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[24] 319 S.W. 2d 349 (Tex. 1958) note 3. See also Northwestern Gas Transmission Co. v. Erhorn, 145 Conn. 83, 139 A. 2d 53 (1961).

[25] Chicago Housing Authority v. Lamar, 2 Ill. 2d 362, 172 N.E. 2d 790 (1961).

[26] 376 Mich. 311, 136 N.W. 2d 896 (1965).

[27] 15 Conn. 137, 204 A.2d 833 (1964).

not the appropriator (the Redevelopment Agency), but two other administrative agencies who interfered. The building standards board refused his application for a building permit to make repairs, and subsequently the Board of Health condemned the building. The owner asked for an earlier date of taking on the basis of a claimed "conspiracy" between these three agencies. The court ruled that no taking had occurred and that the actions of the building board and the Board of Health were legitimate exercises of police power. Once again the non-culpability of the appropriator denied the owner recovery for depreciation.

Compensation Allowed

In the cases in which the property owner has been compensated, the courts are not as concerned with proximate cause as they are with the injustice the landowner will suffer if he is not compensated. They do, however, share with cases of the opposite result the reverence for the rule that damages are to be determined as of the date of taking. An Arizona case serves to illustrate the strength of this rule: A statute was passed changing the date of valuation from the date of issuance of the summons to the date on which the resolution condemning the land is passed,[28] the theory being that the state could save money by not having to compensate the owner for improvements made after the resolution was passed. The statute was declared unconstitutional as violating the provision that "no private property shall be taken—for public—use without just compensation." [29] Subsequently, a landowner tried to enforce the statute in order to be compensated for damage done by vandals after the resolution date but before the issuance of the summons. He was barred because of the unconstitutionality of the statute.[30] The theory developed by the cases which compensate the owner, however, in effect abrogates the date of taking rule, so in reality, only lip service is paid to it.

In 1907, the Pennsylvania Supreme Court recognized the problem of depreciation in full taking cases. In *In Re South Twelfth Street,*[31] the court ruled that the plotting of a street through a private owner's land is not a taking, but recognized that when a plotting has taken place, the owner has lost his right to build on the property, and this depreciates the value greatly. The court said:

> The municipality, in the furtherance of public ends, having stripped the land of nearly its entire value, now, when it seeks to accomplish its purposes in furtherance therewith, is to be allowed to

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[28] Ariz. Rev. Stat., § 18-155d.

[29] Ariz. Rev. Stat., Const. Art. II, § 17; State of Arizona ex rel. Wiley v. Griggs, 89 Ariz. 70, 358 P. 2d 174 (1960).

[30] Dong v. State ex rel. Wiley, 90 Ariz. 148, 367 P. 2d 202 (1961).

[31] 217 Pa. 362 at 366, 66 A. 568 (1907).

> acquire the land by paying a sum measured by the little value the municipality has left in it. Such a result would be a travesty on the constitutional provision which requires—just compensation to be made for the property taken.

The *Twelfth Street* case is an early landmark in the development of the theory of valuation most frequently used when depreciation is compensated, namely, that the property shall be valued as of the date of taking, but any depreciation which occurred because of the project should be ignored.[32] In 1921, in another Pennsylvania street plotting case,[33] the court articulated this doctrine: "The matter (is) worked out practically in assessing the damages, by simply ignoring the detrimental effect of the plotting and treating the value of the property as though there had been no such harmful results."

In a few states, the statutes on eminent domain provide that damages for lands taken shall be fixed at the value thereof "before the taking."[34] These statutes were enacted so that neither enhancement nor depreciation in value attributable to the public project should be considered in fixing valuation. A Massachusetts case pointed out that "before the taking" in the statute should be construed to mean before the beginning of the entire public work which necessitates the taking.[35] The Massachusetts ruling illustrates that what the policy of determining damages as of the date of taking without regard to depreciation caused by the project does, in effect, is to readjust the valuation date to a time immediately before the beginning of the project. If the courts would forget about paying homage to the date of taking valuation rule, and base compensation awards on the value of the property before the inception of the public project, a measure of consistency might be brought to the law with regard to compensation of depreciation damages.

In *State Road Department v. Chicone*,[36] the Florida Supreme Court reconciles the two rules by stating that compensation should be based on the value of property as it would have been at the time of the taking if it had not been subjected to the debilitating threat of condemnation. This suggests that the date of taking basis for valuation should be kept because it is only those effects on value that are due to the project that should be disregarded. In any given case, however, the public project

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[32] See, 2 Lewis on Eminent Domain 1329 (3rd ed. 1909).

[33] Herman v. North Pennsylvania R. Co., 270 Pa. 551, 113 A. 828 (1921).

[34] Tharp v. Urban Renewal and Community Development Agency of City of Paducah, 319 S.W. 2d 453 (Ky. 1965); Nedrow v. Michigan-Wisconsin Pipe Line Co., 245 Iowa 763, 61 N.W. 2d 687 (1953).

[35] Connor v. Metropolitan District Water Supply Commission, 314 Mass. 33, 49 N.E. 2d 593 (1943).

[36] 158 So. 2d 753 (Fla. 1963).

is probably the most significant, if not the only factor affecting the value of the property.

Finally, the Arizona Supreme Court, in *State v. Hollis*,[37] used the rule of ignoring depreciation caused by the public project. Thus, the court ended doing what the unconstitutional statute referred to above had attempted to do.

The Ohio Decisions

The law in Ohio with regard compensation of depreciation in full taking cases is as unsettled as it is in other jurisdictions. An analysis of three recent decisions on the subject will serve to illustrate. (By way of background, it should be noted that the statutory date of take in Ohio is the date of the trial at which compensation is determined,[38] subject to the usual exception that if the appropriator takes possession prior thereto, the date of the taking of possession will be used for valuation purposes).[39]

Cleveland v. Carcione,[40] decided in 1963, compensated the owner for "planning blight." The facts are as follows: In 1957, the city of Cleveland passed a resolution to the effect that it intended to appropriate property for the St. Vincent renewal project. During the next six years, the city acquired and demolished properties in the immediate vicinity of appellant Carcione's property, so that at the time of the trial, the property was "standing in a vast desert." During this time, the County Welfare Department persuaded the relief tenants living in the Carcione property to move out, by threatening to stop their rental payments. The Department also aided tenants in finding new housing. Consequently, at the time of the trial, only three tenants remained and the gross income of the property had declined from $8110.00 in 1957 to $565.00 in 1961. The building had been badly vandalized and stripped of all fixtures. Thus, elements of the *Lamar* case (vandalism), the *Elmwood Park* case (notice to the tenants to move) and the *Research Associates* case[41] (interference by an agency other than the appropriator) [42] are found in this factual situation. The Court of Appeals of Cuyahoga County (Cleveland) held that it was error for the trial court to instruct the jury that the standard by which compensation must be measured

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[37] 93 Ariz. 200, 379 P. 2d 750 at 753 (1963).

[38] Ohio Rev. Code § 5519.01 et seq. See note 20 *supra*.

[39] In re Appropriation for Highway Purposes, 167 Ohio St. 463, 150 N.E. 2d 30 (1958); Nichols v. Cleveland, 104 Ohio St. 19, 135 N.E. 291 (1922); In re Appropriation for Highway Purposes, 9 Ohio App. 471 (1954).

[40] 18 Ohio App. 525, 190 N.E. 2d 52 (1963).

[41] See notes 25-27 *supra*.

[42] It should be noted, as bearing on the question of culpability, that not only was the interfering agency in this case not the appropriator, it was not even an agency of the same governmental unit.

was the fair market value at the time of the trial. It laid down the rule that when the value of a parcel of property has depreciated because of the action of the condemning authority, the owner of such parcel is entitled to the fair market value of the property immediately before the condemning authority took active steps to carry out the work of the project which to any extent depreciated the value of the property.[43] The appellate court, however, left it unclear whether they intended to disregard the date of take standard of valuation, or whether they merely construed the "active steps" of the condemning authority to be a "taking" within the rule.

The Ohio Supreme Court, in *Director of Highways v. Olrich*,[44] obviously believed that the *Carcione* case construed the condemning authority's acts as a taking. The facts and the decision in the *Olrich* case are virtually on all fours with those in the *Research Associates* case discussed above.[45]

In June of 1960, Olrich asked for and was refused a building permit because the property was to be taken for highway improvement purposes. In October of that year, the Urban Renewal Director certified the property for abatement. In 1963, the highway department took possession of the property. The date of take was set by the trial court as the October, 1960 date when the property was condemned.

Substantial damage due to vandalism had occurred between 1960 and 1963. The Supreme Court reversed the decision of the trial court, reaffirming the date of take standard for valuation, and ruling that an order directing that the property be vacated as unfit for human habitation is not a "taking." They distinguished the *Carcione* case on the grounds that the condemnation in this case was a valid exercise of police power, and there were no "active steps to carry out such project which to any extent depreciated the property." In other words, the acts of the appropriator were the remote, not the proximate cause, and therefore the owner must bear the loss.

A recent case, *Becos v. Masheter, Director of Highways*,[46] is probably the most confusing. In the *Becos* case, the main causes of the depreciation were vacancy and vandalism. (The vacancy was not due to any direct interference on the part of the appropriator.) As a result of these causes, the appellant Becos' once valuable duplex, which stood on the property, had a fair market value of zero on the date of the trial. The court ruled that a court may establish a "date of take for valuation of the property taken which is reasonably related to such activity of the appropriating authority" as caused depreciation of the property.

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[43] Carcione v. Cleveland *supra* note 40, at syllabus 1.

[44] 5 Ohio St. 2d 70, 213 N.E. 2d 823 (1966).

[45] *Supra* note 27.

[46] 15 Ohio St. 2d 15 (1968).

The confusion lies in the court's use of the phrase "date of take for valuation." Did the court mean date of take? If so, it can be argued, as it was by Justice Brown in the dissenting opinion,[47] that there was not a sufficient interference with the property (as there was in the *Carcione* case) to amount to a taking. If, however, the court meant that in a case in which there is depreciation the date of valuation should be moved back to a time immediately before the inception of the project, without regard to whether or not a taking has occurred, then a significant legal breakthrough has taken place.

Justice Brown, by the dissent, shows that he feels that the court used the phrase in the latter sense, because he argues that the majority confused the concepts of date of valuation and elements of valuation. He argues for the more common rule of retaining the date of take valuation standard and ignoring any detrimental effects caused by the appropriation. His argument for the position is the familiar one of proximate cause:

> This holding—is unwise because it takes from the jury important questions of fact concerning whether particular aspects of depreciation were or were not caused by acts of the condemner.[48]

The theory behind a rule which would jettison the date of taking standard in depreciation cases, however, is that the project itself is really the "but for which" cause of the depreciation. Perhaps vandals, not the appropriator did the damage, but there would be no vandalism if there were no planning blight, and there would be no planning blight if there were no project, therefore, the appropriator should compensate for all such damage.

What is unclear, however is whether the *Becos* case stands for such a rule. Only its future construction and application will tell.

What is needed is a decision, whether in Ohio or the other jurisdictions, which more clearly articulates what the *Becos* case seems to say. In this way, the constitutional guarantee of "just compensation" will be served and the rights of the individual will be vindicated.

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[47] *Id.* at 19.

[48] *Id.* at 21.