

"LEGAL PROBLEMS OF RIGHT-OF-WAY ACQUISITION"

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My subject is legal problems in the acquisition of right of way. I plan to outline some of the legal problems that arise starting with the very beginning of the acquisition and taking it on through the County Court, Circuit Court and Court of Appeals.

The very first problem facing the Right of Way Agent is to ascertain who holds the legal title to the property desired by the Department of Highways for right of way. Naturally, it is necessary to obtain the title of each and every person having an interest in said property.

In the acquisition of right of way from a private individual one of the most common complaints I have heard is, "we might as well be living in Russia, if the Government can take our property when we don't want to sell it". Of course, I am always quick to point out to that individual that the big difference, in the taking of property by the Government in the two countries, is that in Russia the government takes what property it wants and that is the end of it; while in the United States, the Federal Constitution and the State Constitution guarantees that no person's property shall be taken unless just compensation is paid before the taking; and there is the further guarantee if the private owner cannot agree as to the fair market value of the property to be taken that a jury composed of twelve citizens shall decide the amount to be paid for the property by the taxpayers.

Contrary to popular belief, no one actually owns property outright. Each individual owner holds the title to his property subject to the right of the government to take same when it becomes necessary to be used for the public as a whole. This is evidenced by two Kentucky statutes enacted by the Legislature in 1893. These statutes are: "KRS 381.010 The Commonwealth of Kentucky is deemed to have possessed the original, and has the ultimate property in and to all lands within her boundaries. KRS 381.020 All land titles in this state are allodial, and subject to escheat, the entire and absolute property in all land in this state is vested in the owners, according to the nature of their respective estates; except that the Commonwealth retains that right of eminent domain in and to all real estate." When one person owns the full title to property, it is said that he holds a fee simple title which may be divided into several components, and a few of these components are as follows:

1. A life estate—This means granting the use of property to another for that person's life or for the life of another person.
2. A reversionary interest—This interest lies dormant and does not give the person the right to use the property until the expiration of another estate; such as a life estate.
3. A leasehold—This interest is somewhat akin to a life estate; the chief difference being a leasehold is for a certain number of years.
4. Easements—An easement grants another person certain rights or uses that restrict the use of the property by the fee holder.
5. Mineral and Oil Rights—The mineral and oil rights may be conveyed to another while the fee holder retains the surface rights to the property.

Title to property taken for the construction of roads by the Department of Highways is actually one of three types of easements.

1. The ordinary right of way taken for road purposes is a permanent ease-

ment for road purposes, and this easement continues in force as long as the property is used for road purposes.

2. A temporary easement may be taken by the Department for use during construction only for a certain purpose; such as constructing a private entrance; this type of easement terminates and reverts upon completion of the construction.

3. The Department also takes a permanent easement for a certain purpose; such as, the construction and maintenance of a ditch outlet or inlet, and the owner can continue to use the property so long as he does not interfere with or deny the use for which the easement was granted.

In recent years the Legislature has given the Department of Highways the right to take land in fee simple. This serves a two-fold purpose over the other three types of land titles acquired by the Department. It allows the Department to control the access to and from a limited access Highway, and the Department may sell property obtained in fee that is later found not to be needed for the construction and maintenance of the Highway.

Title to property may be acquired in two ways:

1. By a voluntary deed of conveyance or by a commissioner's deed through court action.

2. By inheritance through the will of a deceased owner or in the event the owner left no will, by the Statute of Descent and Distribution, which states how the title passes to the heirs of the deceased.

The law of the Descent and Distribution was changed by the Legislature on July 1, 1956. Prior to that date the law gave the widow a life estate in $\frac{1}{3}$ of the real estate of her deceased husband, and this was called the dower right. The law also gave the widower the same interest in his deceased wife's estate, and this was called a courtesy interest. After July 1, 1956, both the widow and the widower received under the new law a $\frac{1}{2}$ interest in the estate of the deceased spouse. Now, whenever the Department comes across property that has descended in accordance with the statute of the Descent and Distribution, it is necessary to obtain the actual date of the death in order to know the interest that was inherited, since the old law applies to all deaths occurring before July 1, 1956 and the new law applies to all deaths after that date.

In the reconstruction and widening of highways a legal problem was created by the failure of the Department to obtain deeds for the right of way or to record the deeds after they were obtained. In the early days of road construction the people did not object or question how much of their land was being taken for right of way for the construction of the road, since they were very glad to get the road constructed. The Department of Highways did not have a special Division or Section for the purpose of obtaining right of way; and, in many instances deeds were never obtained or if obtained, they were never recorded. In cases where there are no existing deeds of record, the courts have held that the Department can only claim as existing right of way that which is actually being used and maintained by the Department.

Another legal problem that arises is "when does the title to the property actually pass from the land owner to the Department of Highways?" The law states that the title to property is always vested in someone and that it never hangs suspended between two parties. Most of you know the procedure of the Department in obtaining right of way deeds which procedure was recently changed. The procedure was that the owner executed the deeds and turned them over to the Department's representative who would then forward them to the Frankfort office for payment. It would take a period of from two weeks to six weeks in the ordinary process for payment to be made. This time could be extended by the agent waiting to get several deeds signed before submitting them for payment. During this long procedure some owners would become dissatisfied and would ask that their deeds be returned to them. If the title had passed, the deed could not legally be returned to the owner and it would be necessary for the State to reconvey to the owner.

Also there have been a few cases when the Department desired to abandon the project and return the deeds to the owners; thus, it can be seen that it is of prime importance as to when title passes. The Courts have held that the title passes to the Department when a delivery has been made; and, by delivery they mean when the parties actually intended for the title to pass.

The problem that rankles all good Right of Way men is it seems that the most unreasonable owners usually get more for their property than the owners who accept fair values for their property. As most of you know, prior to July, 1958, the Department made appraisals on a project; and, then a Right of Way Agent was sent to negotiate for the right of way. In a lot of cases the owners conveyed their property to the state for less than its actual value. In 1958, the Department adopted a new policy which is to obtain the best possible appraisal of the market value of property to be taken for right of way and to offer this amount to the property owner without trying to buy the property for less than its actual value. This policy takes care of the reasonable owner and the ones who do not know the value of their property; however, this policy caused a new problem to rise in the County Courts. Several of our condemnation petitions were dismissed on the ground the Department had made a "take it or leave it offer," which has been held to be insufficient to give the Court jurisdiction of the case. I remember one case in particular that was dismissed in the County Court on this ground. The Department refiled the condemnation action after an agent contacted the property owner and negotiated for the property in this manner: On the first contact he offered $\frac{1}{2}$ of the state appraisal for the property; on the second contact he offered $\frac{2}{3}$ of the state appraisal; and on the third contact he offered the whole appraisal. The Court upheld this procedure in the second condemnation action; however, I cannot see that there is any actual difference between the two types of negotiation.

The Department has resolved this problem, I hope, by asking the property owner for a written counter offer or, if he refuses, for an oral counter offer. After this counter offer has been received, the Department reviews the counter offer and then accepts or rejects the counter offer by letter. This has the effect of nullifying the "take it or leave it offer" objection.

A new problem in Kentucky that has arisen in the last few years is the taking of leased property which raises the question "how is the consideration for the property to be divided between the lessor and the lessee?" It is hard for most people to understand that property does not automatically increase in value just because it is leased. The lessor thinks that his property is more valuable because he gets a fixed income for a certain number of years. The lessee thinks he has a valuable property interest for the reason he probably is making his livelihood from the leased property. Theoretically, the division of the consideration for the property is simple; the lessee has a monetary interest only if the rental value of the property today is a greater amount than the rental called for in the lease. If this is the case, the lessee's interest is the difference in the rental values for the remainder of the term of the lease discounted to the present; this total is subtracted from the consideration for the entire property. The remainder is the landowner's part. Today, ninety per cent of leased property needed for right of way results in condemnation actions for the reason that a leaseholder will not sign a deed of conveyance when he is told that his interest has no value.

All of the foregoing concerns a simple lease where the landowner furnishes the entire property, buildings and fixtures that are necessary and the lessee does not have to add anything to the property in order to carry on his business. The division of the award for the entire property becomes much more complicated where the lessee adds buildings and fixtures to the property under the terms of the lease.

When the Department is unable to agree with an owner, it has to file a condemnation petition in the County Court in the County where the land lies. There are three particular requirements necessary to file a condemnation action:

1. There has to be an authorization by the Commissioner declaring that the land is necessary for the construction of a certain project.
2. The petition has to contain a description of the land that is needed.
3. There has to be an allegation that the Department was unable to contract or agree with the owner or owners for the purchase of the property.

After the petition is filed, the County Judge appoints three Commissioners to go upon the property and appraise the value of the property taken and the damages, if any, resulting to the remainder of the land. Then, the Commissioners return a written report to the County Court; summons containing a statement of the award are issued to all defendants who are residents of the state. In the case of non-resident defendants a warning order attorney is appointed to write a letter to the last known address of said non-resident defendants to notify them of the nature and pendency of the action.

The present condemnation statute is very unsatisfactory in its requirement that three Commissioners be appointed to make appraisals. It is unsatisfactory from the standpoint of the persons appointed to do the job in that they suffer much abuse from the land owners and they lose friends and business by serving as Commissioners. It has become, therefore, increasingly difficult for the County Judge to obtain good men to serve as Commissioners of the County Court in condemnation actions. It is unsatisfactory from the standpoint of the Commonwealth in that the statute does not require the person appointed to have any appraisal experience or education or have any knowledge of market value of property. The statute requires only that the person appointed be a landowner and a housekeeper in the County where the land lies. It will take time to resolve this problem since the Court of Appeals has ruled that the present statute is constitutional by holding that the depositing of the amount of the Commissioners' award with the County Court Clerk satisfies the constitutional requirement that just compensation be paid before private property is taken. Therefore, we should proceed with caution and be ready to submit an adequate substitute before asking the Legislature to do away with the County Court Commissioners in our condemnation statute.

One of our legal problems is the acquisition of property from persons who are under a disability, which means not of legal age or incompetent mentally. There are two methods by which these titles may be acquired by the State: (1) The personal representative of the person under disability may petition the Circuit Court for its approval to convey the title to the State for a specified amount of money, or (2) the State may condemn the property as in any other case. The latter method is used mainly for the reason that the state prepares the necessary pleadings and also pays the cost of the action.

One of our problems in the past has been one created inadvertently by the Department itself by awarding a contract for construction before all rights of entry have been obtained. This permits the owner's attorney to stall along and prevent the County Court judgment from being entered and thereby prevent the contractor from entering upon the property. This has the effect of forcing the Department to pay the owner's asking price without having a trial of the case on its merits. Thus, it is a matter of economics whether the Department would rather pay a larger amount to the road contractor by cutting his liquidated damages for an overrun on his contract or paying the land owner his price. This problem has practically been resolved by the Department's awarding provisional contracts whereby it is agreed that the contractor cannot use as an excuse for an overrun the fact that he was not given possession of all of the Right of Way at the time the contract was awarded.

The County Court judgment gives the Department the right to enter upon the property upon the payment of the amount of the County Court judgment to the County Court Clerk or to the owner himself; however, this judgment cannot be entered until the next regular term of the County Court after the defendants have been summoned the time prescribed by the Civil Code, which is twenty

days for residents and fifty days for non-residents. All County Courts begin their regular terms on a designated Monday of each month; thus, if a person has only been summoned 19 days when the County Court term begins, this means that the judgment cannot be entered against him until the next County Court term or approximately 30 days.

After the defendants have been summoned, several of the different delaying defenses that may be used by the defendant's counsel to stall and to keep the judgment from being entered are: (1) Motion alleging that the description is too indefinite and uncertain. (2) The Commissioner's Report is not in the correct form. (3) The property sought to be condemned is not necessary. (4) The condemnation statute is unconstitutional. (5) The sheriff did not serve each of the parties but just handed all of the summons to one person. (6) No offer or attempt was made to purchase the property. (7) The Commissioners were not sworn in.

Another unforeseen delay results when a resident of the state is absent from the state so that the summons cannot be served or cannot be found, since the 20 days does not start to run until after the summons has been served. I remember one case in which the defendant had left the state and the summons could not be served. In this event the only thing that can be done is to wait until he has been gone 4 months; then, a warning order attorney may be appointed to notify him as in the case of a non-resident defendant which entitles him to another 50 days.

The owner's counsel is entitled to be heard in open Court on any issue that has been raised in his pleadings. This results in a delay since it is necessary to find an agreeable date for the hearing that is convenient for the Judge, the defendants Counsel and the Department's attorney. This, of course, results in a postponement of 2, 3, 4, 5, or more weeks.

After judgment has been entered and the amount of the award posted with the County Clerk, the question arises "when does the state obtain possession?" The condemnation statute states that the Department is entitled to immediate possession upon posting the amount of the judgment and paying the cost of the action; but, almost every Court will allow tenants, lessees or landowners a reasonable time to give up possession of the property which is usually from 10 to 60 days.

After judgment has been entered, the statute provides that either or both sides may appeal from the judgment within 30 days to the Circuit Court for a jury trial. The next question is "when does the 30 days start to run?" The Civil Rules of Procedure states that the time for appeal does not begin to run until the judgment of the County Court has been entered on the County Court Order Book and the Order Book signed by the Judge. The Department has always taken the position that a condemnation action is purely a statutory proceeding and that the Civil Rules of Procedure do not apply except where the statute specifically says so; therefore, the 30 days starts to run immediately upon the signing of the judgment by the County Court. This question is now pending before the Court of Appeals for a decision.

During the actual jury trial the biggest problem now facing the Department is to keep the jury from making its award by splitting the difference between the evidence offered by the condemnor and the evidence offered by the landowner. In most partial taking cases the attorney for the owner finds that it is to his advantage to claim that the remaining property has been damaged 50 per cent and that the jury will usually split the difference between the Department's evidence and this 50 per cent damage. I have found that it makes no difference in the owner's evidence whether the property taken is a strip along the front of the property or a strip from the middle of the property or a strip from the rear of the property, the owner's evidence is always that the remainder of his property is damaged 50 per cent unless the remainder is land-locked; then the damage becomes 100 per cent. This problem can *only* be resolved; (1) by the Depart-

ment preparing its case in such a manner that the jury will be impressed by the fact that the Department's evidence of the value is the fair value for the property (2) by the education of the public that the Department of Highways actually makes fair and correct appraisals of the fair market value and that these appraisals are offered to the landowners without trying to purchase the property for less than its value.

My final problem deals with appeals from the Circuit Court to the Court of Appeals. After a jury has rendered a verdict and a judgment has been entered in the Circuit Court, either side may take an appeal to the Court of Appeals. Contrary to popular opinion the Court of Appeals does not rehear the case. In fact, the Court of Appeals will not countenance an objection that the jury award was excessive unless it appears at first blush that the award was given under the influence of passion or prejudice. The Court has consistently held that if the jury verdict is within the evidence offered at the trial, the judgment will not be reversed on the ground of excessiveness. The ordinary and usual grounds for a reversal of a Circuit Court Judgment is that a prejudicial error of law was committed in the trial Court. If the Court of Appeals holds that such an error was committed, the case is remanded back to the Circuit Court for another jury trial; otherwise, the Circuit Court Judgment is affirmed.

RIGHT OF WAY NEGOTIATION POLICY MEMORANDUM NO. 1

The policies set forth herein must be strictly and consistently adhered to by all Right of Way Division personnel.

The policy and procedure of the Kentucky Department of Highways in all negotiations shall be at all times directed to accomplish the end result that the property owner is paid the just compensation to which he is by law entitled; that the settlement represents compensation that is just and fair to the public; and that every courtesy, consideration and patience be extended to the property owner.

It is incumbent upon the negotiating Right of Way Buyers at all times to honestly protect the interests of the property owners, as well as the State, and especially those owners who may be unfamiliar or inexperienced in real estate transactions and real estate values.

The Department will not countenance the time-worn practice of "horse trading" in negotiations for the purchase of right of way. This method of operation in most instances results in certain owners being paid in excess of the fair market value while other owners and especially those having complete confidence in our Department as well as a desire to cooperate, receive less compensation than that to which they are justly entitled.

There are sometimes cases in negotiations where the Right of Way Buyer is reasonably justified in settling a transaction below the figure as set forth in the approved appraisal report. Examples are:

1. In cases where the property is listed for sale on the open market for a price less than the amount of our appraisal, or a well-informed owner offers to sell to the State for less than our appraised value.

2. On properties where the negotiator has secured additional information which was not available to the appraiser, or other supporting data which specifically indicates a lower value of the property as a whole or its individual items than that set forth in the approved appraisal.

3. In cases where the State makes appraisal allowances based on a certain plan of alteration or relocation of buildings or other facilities of the owner; whereas, the owner may be satisfied with some alternate and cheaper plan that would still have the same degree of utility and would mitigate the damages to the same extent. The same situation holds true on farm operations, where the owner may suggest or accept some alternate plan that will be more adaptable to his particular operations than that suggested by the State's appraiser.

Upon adequate showing in the buyer's transmittal memorandum setting forth

the specific reasons fully justifying *any* deviation in the settlement above or below the appraised value, the Right of Way Division in Frankfort will approve such settlements. Otherwise, the settlement must conform to the approved appraisal.

Within the policy framework of the Kentucky Department of Highways, the only equitable and sound method of procedure in carrying on right of way negotiations is by following the five steps listed below:

1. Fully inform the property owner on the public necessity of the proposed highway improvement as it affects his property and the comprehensive engineering studies made in determining a location which does the least possible private injury with the greatest overall public good.

2. Particularly stress the effort of the Right of Way Division to get the most competent appraisers available. Explain the thorough and detailed economic analysis and study which goes into the appraisal.

3. Thoroughly explain to the property owner that as a protection to him as well as a protection to all of the rest of the taxpayers of the State of Kentucky, the State Highway Right of Way Division does not "*horse trade*", and that when the offer of settlement as disclosed by the appraisal report has been made, no other offer of settlement will be submitted, unless additional information indicates that our original appraisal does not reasonably reflect true market value.

4. Explain carefully to the property owner that our offer is the *full amount* of the appraisal. Further explain that we stand ready and willing at all times to review with him or with his own expert appraiser the sales of comparable properties and other data upon which our appraisal was formulated.

5. Apprise the property owner fully of his rights under the laws of eminent domain if no agreement can be reached and condemnation action is necessary.

Considering the huge increase in the right of way acquisition program presently confronting us, it is imperative that we stand on this sound policy in connection with our right of way negotiations to the end that our settlements will be as fair and equitable to the property owner as they are to the State. You will please be guided accordingly.