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CASE COMMENTS

EMINENT DOMAIN: COMPENSATION FOR CONDEMNED LANDS — FAIR MARKET VALUE OR WINDFALL PROFITS? * **

Department of Transportation v. Nalven, 455 So. 2d 301 (Fla. 1984)

Petitioner condemned¹ respondent's land for use in constructing an interstate highway. Petitioner's appraiser² testified as to the parcel's worth using the comparable sales method of valuation.³ The appraiser excluded two prior sales of comparable properties because the value of those parcels was enhanced by anticipation of the government project.⁴ These exclusions resulted in a lower estimate of the value of the land than the estimate of respondent's appraiser who included the two enhanced sales prices in his assessment.⁵ Respondent argued unsuccessfully at trial that testimony about the lower appraised value was erroneous and denied him full compensation guaranteed by article X of the Florida Constitution.⁶ The Florida Second District Court of Appeal agreed with respondent and reversed the trial court's award.⁷

* EDITOR'S NOTE: This case comment was awarded the *George W. Milam Award* as the outstanding case comment submitted by a Junior Candidate in the Fall, 1984.

** In 1985 the Florida legislature amended chapter 73.071 of the Florida statutes adopting the scope of the project rule. The editors chose to publish this comment because it examines both the evolution of eminent domain valuation problems in the absence of the scope of the project rule and policy which supports its adoption.

1. *Department of Transp. v. Nalven*, 455 So. 2d 301 (Fla. 1984). The project extended Interstate Highway 75 through a portion of south Florida.

2. See generally 5 P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 18.4 (J. Sackman, rev. 3d ed. 1981) (since valuation of real estate is not an exact science, appraisers serve as expert witnesses to aid the jury in making its determination of award); Comment, *The Use of Opinion Testimony for Valuing Real Property in an Eminent Domain Suit*, 19 *LAND & WATER L. REV.* 43 (1984) (discussion of the importance of appraiser testimony in a condemnation proceeding).

3. See *THE FLORIDA BAR, FLORIDA EMINENT DOMAIN PRACTICE AND PROCEDURE* § 8.36 (3d ed. 1977) (the method consists of comparing prior sales of similar property to gauge the present value of the condemned land); 1 L. ORGEL, *VALUATION UNDER THE LAW OF EMINENT DOMAIN* §§ 136-37 (2d ed. 1953) (an appraiser may consider sales of the same or similar property). See also Sengstock & McAuliffe, *What is the Price of Eminent Domain?*, 44 *U. DET. J. URB. L.* 185 (1966) (discussion of the most common techniques of land valuation).

4. *Department of Transp. v. Nalven*, 455 So. 2d 301, 302-03 (Fla. 1984). See generally Comment, *Time for Fixing Damages — Superhighway Construction*, 1 *VILL. L. REV.* 105 (1956) (discussion of the point in time at which valuation of land should occur).

5. *Department of Transp. v. Nalven*, 455 So. 2d 301, 302-03 (Fla. 1984). The difference between the estimate of petitioner's appraiser which excluded the prior sales and that of respondent's which included them was \$83,285.

6. *FLA. CONST.* art. X, § 6(a) provides: "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner."

7. *Nalven v. Division of Admin.*, 409 So. 2d 166 (Fla. 2d D.C.A. 1982). The jury awarded respondent \$133,525. This figure matched the state appraiser's estimate of the parcel's value plus fencing replacement costs. The estimate of the landowner's appraiser for the land plus fencing

On certification,⁸ the Florida Supreme Court HELD, in a condemnation proceeding, a landowner is entitled to compensation for the enhancement in value expected to result from the improvement for which the owner's land is condemned.⁹

The eminent domain power is an inherent attribute of sovereignty.¹⁰ State constitutional provisions concerning eminent domain appropriation thus act to limit an already existing power.¹¹ The Florida Constitution of 1885 originally contained two limiting provisions:¹² section 12 of the Declaration of Rights mandated "just compensation" for property taken by the government,¹³ and article 16 required "full compensation," including payment for enhanced value brought about by anticipated improvement of property appropriated to the use of a corporation or individual.¹⁴

In *Sunday v. Louisville & Nashville Railroad*,¹⁵ the Florida Supreme Court upheld the validity of such full compensation. A railroad sought to appropriate Sunday's land. To aid the jury in determining fair market value, the trial court instructed jurors to ignore any enhancement in property value caused by the railroad's proposed improvement.¹⁶ The Florida Supreme Court reversed, finding the judge's instructions denied full compensation required by article 16 of the Florida Constitution.¹⁷ The court interpreted full compensation to be fair

replacement costs was \$217,914, or an amount \$84,389 greater than the amount awarded. *Id.* at 167.

8. FLA. CONST. art. V, § 3(b)(4). The question certified was: "TO WHAT EXTENT, IF ANY, IS A FLORIDA PROPERTY OWNER IN A CONDEMNATION PROCEEDING ENTITLED TO THE ENHANCEMENT IN THE VALUE OF HIS PROPERTY CAUSED BY THE ANTICIPATION OF THE PROPOSED PROJECT FOR WHICH THE LAND IS BEING CONDEMNED?" *Nalven v. Division of Admin.*, 409 So. 2d 166, 171 (Fla. 2d D.C.A. 1982).

9. *Department of Transp. v. Nalven*, 455 So. 2d 301, 307 (Fla. 1984).

10. 1 P. NICHOLS, *supra* note 2, § 1.14; A. JAHR, *LAW OF EMINENT DOMAIN VALUATION AND PROCEDURE* 3 (1953) (eminent domain evolved into a sovereign power due to traditional laws). *Accord Spafford v. Brevard County*, 92 Fla. 617, 110 So. 451 (1926) (government power to take is an incident of sovereignty). For a brief history of the evolution of eminent domain concept from ancient times to the present see, Searles, *Eminent Domain: A Kaleidoscopic View*, in *REAL ESTATE CONDEMNATION: RECENT DEVELOPMENTS AND NEW TRENDS* 193 (1976).

11. 1 P. NICHOLS, *supra* note 2, § 1.3.

12. FLA. CONST. of 1885, Declaration of Rights 12, and FLA. CONST. OF 1885, art. XVI, § 29.

13. FLA. CONST. of 1885, Declaration of Rights 12 provided: "[N]or shall private property be taken without just compensation." *Id.*

14. FLA. CONST. OF 1885, art. XVI, § 29 provided: "No private property . . . shall be appropriated to the use of any corporation or individual until full compensation therefore shall be first made to the owner . . .; which compensation, irrespective of any benefit from any improvement proposed by such corporation or individual, shall be ascertained by a jury. . . ." *Id.* See generally Sheppard, *Compensation in Florida Condemnation Proceedings*, 14 U. FLA. L. REV. 28 (1961) (Florida case law supports the view that full compensation goes beyond the requirement of just compensation called for by the United States Constitution).

15. 62 Fla. 395, 57 So. 351 (1912).

16. *Id.* But cf. *Pozin v. State Dep't of Transp.*, 281 So. 2d 73, 74 (Fla. 1st D.C.A. 1973) (an appraiser can consider only general enhancement, not special enhancement to property uniquely benefited by the proposed construction).

17. *Sunday*, 62 Fla. at 397, 57 So. at 351.

market value¹⁸ at the time of appropriation.¹⁹ In the court's view any increase in value of the condemned land in anticipation of the proposed improvement, and before actual appropriation, was properly compensable.²⁰ Application of this principle, known as "the Sunday rule," subsequently was extended to cover takings by the state.²¹

In *State Road Department v. Chicone*,²² the Florida Supreme Court both reaffirmed and refined the meaning of the *Sunday* rule. The *Chicone* court addressed the issue of whether an appraiser could consider loss in value resulting from a proposed improvement.²³ The State Road Department argued under the logic of the *Sunday* decision that an appraisal must consider both appreciation and depreciation.²⁴ The Florida Supreme Court rejected this interpretation, ruling that the exclusion of depreciation testimony was proper.²⁵ The court reasoned that the state's proposed rule might permit a condemnor to depreciate property values by threat of condemnation, and then take advantage of the depressed value by paying the landowner only the depreciated value.²⁶ Thus, the court construed *Sunday* to mean that a landowner could receive compensation for

18. *Id.*; see 1 L. ORGEL, *supra* note 3 at § 70 (discussion of fair market value as interpreted by various courts); 4 P. NICHOLS, *supra* note 2, at § 12.2 (fair market value defined as "the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses for which the land was suited..."). *But cf.* Comment, *Eminent Domain Valuation in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61 (1957) (growing dissatisfaction with fair market value as a standard of compensation because it does not take into account all of the condemnee's losses).

19. *Sunday*, 62 Fla. at 397, 57 So. at 351.

20. *Id.*

21. See, e.g., *Anderson v. State Road Dep't*, 204 So. 2d 899 (Fla. 1st D.C.A. 1968) (state road department condemned land for interstate highway construction). See also *Casa Loma Springs Dev. Co. v. Brevard County*, 93 Fla. 601, 112 So. 60 (1927) (public road authorities appropriated land to build a right of way). *But see Daniels v. State Road Dep't*, 170 So. 2d 846 (Fla. 1964). In this case the Florida Supreme Court considered the problem of calculating remainder damages which are incurred when a part of a larger parcel is taken. The court decided that any decrease in the value of the remaining part could be offset against any enhancement in value caused by the severance. The court's investigation of the Journal of Proceedings of the Constitutional Convention of 1885 revealed that body's intention to apply FLA. CONST. of 1885, art. XVI, § 29 only to private individuals and corporations. Such parties would be bound by the standard of full compensation. In contrast, the court found that the state and its agencies were bound only by the standard of just compensation found in section 12 of the Declaration of Rights of the Florida Constitution of 1885. By implication the *Daniels* court suggested that the state might not have to pay full compensation for enhanced value due to anticipated improvement. The instant court resolved this issue by ruling in favor of such payment.

22. 158 So. 2d 753 (Fla. 1963). See also *Dade County v. Still*, 377 So. 2d 689 (Fla. 1979) (condemning authority cannot benefit from depression in property value caused by prior announcement that property will be taken for a public project); *Gleason v. State Road Dep't*, 178 So. 2d 199 (Fla. 2d D.C.A. 1965) (fair market value prior to government induced depreciation must be paid, but only if the defendant raises the issue at trial).

23. *Chicone*, 158 So. 2d at 754. See THE FLORIDA BAR, *supra* note 3; § 8.35 (a common effect of imminent condemnation is a loss in value of the condemned res brought about by restrictions on the property's economic use in the period leading up to the actual taking).

24. *Chicone*, 158 So. 2d at 756.

25. *Id.* at 758.

26. *Id.* at 757.

enhanced value, but did not have to accept payment based on diminished value.²⁷

In contrast to Florida's *Sunday* rule, federal courts apply a different standard²⁸ known as the "Scope of the Project rule" [the SOP rule].²⁹ For purposes of determining just compensation under the United States Constitution, this rule effectively nullifies both depreciation and appreciation resulting from anticipated condemnation.³⁰ Under the federal standard, if land is probably within the scope of the project at the time the government commits to proceed, any increase in value occurring after commitment is not compensable. Because any increment in value occurring after commitment to a project, but before actual appropriation, would derive solely from the impending condemnation, such enhanced value would exceed the fair market value from the government.³¹

In *United States v. 320.0 Acres of Land*,³² condemnees argued to the United States Court of Appeals, Fifth Circuit, that application of the SOP rule denied them compensation required by the fifth amendment.³³ In deciding the case the appellate court analyzed the history of the SOP rule and noted three justifications for its use.³⁴ First, the rule assured that the government would not have

27. *Id.* at 754.

28. Thus, federal courts, even if sitting in Florida, are not bound by Florida eminent domain law in the matter of determining compensation. As the United States Supreme Court noted in *United States v. Miller*, 317 U.S. 369 (1943):

We need not determine what is the local law, for the federal statutes upon which reliance is placed require only that, in condemnation proceedings, a federal court shall adopt the forms and methods of procedure afforded by the law of the State in which the court sits.

They do not, and could not, affect questions of substantive right — such as the measure of compensation — grounded upon the Constitution of the United States.

Id. at 379-80. *Accord* *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (the law to be applied in any case is the law of the state, except in matters governed by the Federal Constitution or by acts of Congress).

29. *See* *United States v. Miller*, 317 U.S. 369 (1943). The *Miller* court first articulated the scope of the project concept. It held that where a public project includes "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 . . . due to the projected improvement." *Id.* at 376-77. *Accord* *United States v. Reynolds*, 397 U.S. 14 (1970) (the SOP rule held to mean that if lands were probably within the scope of the project from the time the government was committed to it, no enhancement in value attributable to the project is to be considered in awarding compensation).

30. In *United States v. Reynolds*, 397 U.S. 14 (1970), a case involving application of the SOP rule, the United States Supreme Court noted "to permit compensation to be either reduced or increased because of an alteration in market value attributable to the project itself would not lead to . . . just compensation. . . ." *Id.* at 16. *See* UNIFORM EMINENT DOMAIN CODE § 1005 (1974) (describes the discounting of increases or decreases in value due to anticipated improvement as necessary for the calculation of fair market value).

31. *See supra* note 30.

32. 605 F.2d 762 (5th Cir. 1979).

33. *Id.* at 768.

34. *Id.* at 782-83. *See generally* *United States v. Cors*, 337 U.S. 325, 333 (1949) (it is unfair for the government to pay an enhanced price which its demand alone has created due to a special need); Note, *Valuation of Conrail Under the Fifth Amendment*, 90 HARV. L. REV. 596 (1977) (allowing the individual to recover more from the government than he could from a private party impairs the government's ability to allocate scarce social resources for the public good).

to pay more than the fair market value which a private buyer might pay.³⁵ Second, the rule would help limit the cost of public projects and frustration of public objectives.³⁶ Third, the rule would avoid the payment of windfall gains to private property owners because of public needs and exigencies.³⁷ Based on these considerations, the court approved the rule itself, but declined to apply it under the peculiar facts of *320 Acres*. The court determined the government's lengthy inactivity in proceeding with its proposed project as well as the failure to allocate funds for payment to landowners demonstrated a lack of commitment.³⁸ Without such commitment, the SOP rule was not triggered.³⁹

The instant case provided the Florida Supreme Court with an opportunity to choose between the *Sunday* rule and the SOP rule. The issue arose as a result of changes occasioned by the 1968 constitution.⁴⁰ Whereas the *Sunday* decision applied then article 16, which authorized awarding enhanced value due to anticipation of government improvement, the 1968 constitution did not expressly include the provisions of article 16.⁴¹ Although faced with an opportunity to reconsider the *Sunday* rule, the instant court refused to do so⁴² and reaffirmed its adherence to the minority position.⁴³

Among several grounds for its decision, the court looked first to the state constitution⁴⁴ and the Florida eminent domain statute.⁴⁵ The majority found that the constitutional standard of full compensation as retained in the 1968 constitution required payment for enhanced value.⁴⁶ In retrospect, the instant court determined that article 16, which was later deleted, required application of the full compensation requirement.⁴⁷ Further, the court cited the current eminent domain statute as controlling the meaning given by the state legislature to the full compensation provision.⁴⁸ Since the statute required valuation of property as of the date of trial, or the date when title passed, whichever occurred

35. *320.0 Acres*, 605 F.2d at 782.

36. *Id.*

37. *Id.*

38. The government argued that its commitment to the project began in 1958 when Congress voted to redefine the boundaries of Everglades National Park to include the land in question. The condemnation trial was held in 1976. Applying the SOP rule, the government attempted to exclude evidence of any prior sales of the condemned land or similar parcels over the intervening eighteen year period. The appellate court ruled the long period of government inactivity demonstrated a lack of commitment to the project. *Id.* at 771, 796-97.

39. *Id.* at 796.

40. THE FLORIDA CONSTITUTION of 1968 did not include the reference to payment for enhanced value due to anticipated improvement contained in FLORIDA CONSTITUTION of 1885, art. XVI, § 29.

41. *See supra* note 6 and accompanying text.

42. *Department of Transp. v. Nalven*, 455 So. 2d 301, 306 (Fla. 1984).

43. *Id.* at 310; *Nalven v. Division of Admin.*, 409 So. 2d 166, 169 (Fla. 2d D.C.A. 1982); 4 P. NICHOLS, *supra* note 2, at § 3151[7].

44. *Department of Transp. v. Nalven*, 455 So. 2d 301, 305-06 (Fla. 1984).

45. *Id.* at 307. FLA. STAT. 73.071(2) (1983) provides that compensation for property taken under the state's eminent domain power must be determined as of the date of trial or the date upon which title passes, whichever occurs first.

46. *Department of Transp. v. Nalven*, 455 So. 2d 301, 305 (Fla. 1984).

47. *Id.* at 305.

48. *Id.* *See supra* note 45 and accompanying text.

first, adherence to the constitutional principle of full compensation and its statutory expression required payment for enhanced value.⁴⁹

In addition, the court looked to the facts of the case itself. Although the two sales excluded by petitioner's appraiser predated⁵⁰ Department of Transportation resolutions indicating interest in the condemned land,⁵¹ petitioner argued the sales should nevertheless be disregarded because the scope of the project was generally known in the marketplace.⁵² The majority found such an uncertain means for fixing the date of valuation flawed.⁵³ Because discussions of interstate highway construction projects could extend over several decades, the court concluded that pinpointing a precise time when the scope of the project was known in the market would prove impractical.⁵⁴ Thus, the court rejected the SOP rule in favor of the *Sunday* rule.⁵⁵

In a strong dissent, Justice Overton repudiated *Sunday* as an outdated decision based on a constitutional provision no longer in existence.⁵⁶ He also found illogical the scheme of compensating condemnees for government induced enhancement while disregarding government induced depreciation.⁵⁷ In his view, the majority's decision would result in windfall profits for the few at the taxpayers' expense.⁵⁸ The dissent, therefore, favored the SOP rule as more equitable in balancing the rights of condemnees against the burden on taxpayers.⁵⁹

Any decision regarding remuneration for the taking of land under the state's eminent domain power must account for the principle of full compensation.⁶⁰ The instant court grappled with how best to implement this objective by balancing constitutional,⁶¹ equitable,⁶² and practical⁶³ considerations. An evaluation of these concomitant goals persuaded the majority to favor the *Sunday* rule. Strong arguments against the rule, however, suggest a reevaluation.

49. Department of Transp. v. Nalven, 455 So. 2d 301, 306-07 (Fla. 1984).

50. *Id.* at 303. These two prior sales occurred in 1973. *Id.*

51. *Id.* The Department of Transportation issued a resolution indicating the general location of the proposed highway in 1974. A resolution indicating specific tracts needed followed in 1977. *Id.*

52. *Id.* The project was openly discussed at public meetings and received mention in documents open to the public. *Id.*

53. *Id.* at 307.

54. *Id.*

55. *Id.*

56. *Id.* at 309-10.

57. *Id.* at 309.

58. *Id.*

59. *Id.* In a separate dissent, Justice McDonald agreed that not permitting petitioner's appraiser to exclude property with inflated prices from his assessment of value would result in windfall profits. *Id.* at 310-11.

60. Dade County v. General Waterworks Corp., 267 So. 2d 633, 641 (Fla. 1972). *Accord* Jacksonville Expressway Auth. v. Henry G. DuPree Co., 108 So. 2d 289, 292 (Fla. 1959) (a practical attempt should be made to make the owner whole) (quoting Dade County v. Brigham, 47 So. 2d 602, 604 (Fla. 1950)).

61. Department of Transp. v. Nalven, 455 So. 2d 301, 304-07 (Fla. 1984).

62. *Id.* at 306-07.

63. *Id.* at 307.

One such argument rests upon equitable grounds. Both the *Sunday* rule and the SOP rule seek to place the condemnee in a position at least equal to that occupied before condemnation.⁶⁴ The latter rule accomplishes this by disregarding entirely any government induced change in the value of the condemned res.⁶⁵ The former rule, as interpreted by the *Chicone* court, guarantees only that diminished value will be disregarded.⁶⁶ Thus, under the *Sunday* rule a landowner can attain a better position when land values rise due to an anticipated government improvement. While the objective of adequate compensation supports full remuneration, a requirement that the government compensate in excess of fair market value thwarts the objective. Under such a scheme a private buyer would not have to pay for such enhanced value,⁶⁷ and fairness dictates both private and government buyers should pay the same amount for the same property. Yet under the *Sunday* rule the government must pay more solely because of its need to act in the public behalf. A more equitable approach is to carry the *Chicone* rationale one step further by disregarding not only diminished value, but also enhanced value.

While the principle of equity supports disregarding government induced changes in value, identifying these changes is difficult. This difficulty represents a major disadvantage of the SOP approach. The instant court recognized the problem, noting the difficulty of pinpointing the proper date for application of the rule.⁶⁸ Traditionally such date was held to be that of government commitment to the project.⁶⁹ In many cases this commitment is easily ascertainable. In others, such as *320.0 Acres*, the long term nature of the project makes the date of commitment more difficult to determine. The best solution to this problem, suggested by the *320.0 Acres* court, is to make the date of commitment a question of law based on reasonable expectations.⁷⁰ Thus, when the prospect of condemnation becomes sufficiently definite to affect a reasonable person's decision to buy or develop a property, the SOP rule is triggered. The responsibility for making this determination would rest with the judge.⁷¹

Applied to the instant case, this analysis would not fix the cutoff date mechanically, such as would be the case if the date of government resolution was determinative. The trial court could have considered evidence demonstrating the respondent's actual knowledge that the state would likely take the land in question. The petitioner produced such evidence including publicity of the gov-

64. Both rules seek to discount any depreciation in the value of the condemned res caused by imminent condemnation.

65. See *supra* notes 29-30 and accompanying text.

66. *Chicone*, 158 So. 2d at 754.

67. A private buyer would merely pay the fair market value. Under the *Sunday* rule, however, the government must pay the fair market value plus any enhancement in value caused by the imminence of its own taking.

68. Department of Transp. v. Nalven, 455 So. 2d 301, 307 (Fla. 1984).

69. 4 P. NICHOLS, *supra* note 2, § 3151[7].

70. *320.0 Acres*, 605 F.2d at 807.

71. *Id.* at 807 n.90. See Bishop, *Enhancement as an Offset to Damages*, in INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 233 (1976) (preferable rule is to let the judge decide if property condemned was probably within the project's original scope).

ernment's intentions and testimony that prior sales were made in consideration of the common awareness of the proposed location of the highway.⁷² Such evidence could have verified whether a reasonable expectation of condemnation existed even before the resolution. Therefore, the SOP rule could have been triggered as of the date the respondent demonstrated reasonable market knowledge of the impending project. Applying the rule in this manner to the instant case would justify the exclusion of the disputed sales by petitioner's appraiser. Although the sales occurred before the earliest resolution, they reflected enhanced value based on expected condemnation.

Finally, the element of prohibitive cost, emphasized in Justice Overton's dissent, detracts from the viability of the *Sunday* rule.⁷³ Faster depletion of tax revenues and a corresponding lag in needed government improvements are likely results of its implementation. Only an increase in taxes or a significant expansion of the tax base could offset the probable depletion.

Despite the difficulty in applying the SOP rule, it represents the more equitable approach to eminent domain valuation problems. The government should not have to pay more for land than a private buyer, merely because it is acting in the public behalf. In such a rapidly growing state as Florida,⁷⁴ the need for public improvements is inevitable. Judicial or legislative implementation of the SOP rule will allow the state to better meet these needs while using tax revenues most effectively.

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72. Department of Transp. v. Nalven, 455 So. 2d 301, 303 (Fla. 1984).

73. *Id.* at 309-10.

74. See St. Petersburg Times, Jan. 8, 1984, B, at 18, col. 1 (current population of Florida is approximately 10.6 million with a predicted growth to 14.8 million by the year 2000).