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UPDATING THE TIME OF "TAKING"
IN CONDEMNATION PROCEEDINGS IN OKLAHOMA

Justice Holmes: ". . . the question is what has the owner lost, not what has the taker gained."¹

The Oklahoma Constitution provides that in eminent domain proceedings, the property is taken, and its fair market value determined, as of the date of paying the award fixed by the commissioners to the owner or into court for the owner; and in the event of a jury trial the fair market value of the property is to be fixed as of that date.² When the entire tract of land is not taken the depreciated value of the remaining portion is also added to the damages.³ The time between the first stages of condemnation and the payment of compensation, or final stage, is a period in which many inequities may befall the property owner. These dangers, inherent in the passing of this time between the two stages, are the subject of this note.

The case which can best serve as an example of not using an early stage as a time of taking is *In re Elmwood Park Project Section 1, Group B*.⁴ The City of Detroit, on June 7, 1950, sent form letters to landowners in the area in question that condemnation was about to be started. Suit followed and *lis pendens* was filed. After ten years the city abandoned the project and discontinued suit. Two years later, the case reached the Supreme Court of Michigan when the action was again filed in 1962. The Court returned the case to the trial level when it found that a jury should determine

¹ *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910).

² Williamson, *Eminent Domain in Oklahoma*, Commentary, OKLA. STAT. ANN. tits. 26-31, pp. 345, 363 (1955). See, OKLA. CONST. art. II § 24, providing that until compensation be paid the owner, the property shall not be disturbed or the proprietary rights of the owner divested.

³ Williamson, *supra* note 2, at 362. OKLA. CONST. art. II § 24.

⁴ 376 Mich. 311, 136 N.W.2d 896 (1965).

whether the taking occurred in 1950 or in 1962. The Supreme Court stated it was an error to instruct the jury that “. . . your duty is to find the value of the property at the time of taking, which is the time of your verdict and at no other time.”⁵ Both parties agreed that value should be fixed as of the time of the taking; but the city contended that in Michigan, as well as in other jurisdictions (Oklahoma included), the time of taking was that time when necessity is determined and compensation made or secured.⁶ The condemnee in this case claimed that rather than the literal meaning of the word “taking”, the meaning should be broadened. He claimed that the following acts constitute a taking:

1. Sending letters to tenants, occupants, etc., causing them to move; creating vacancies, forcing reduction in rents as inducements for occupants to stay;
2. Filing *lis pendens*, thereby impairing the sales of properties, and reducing values and sales prices;
3. Refusal of the building department to issue permits for substantial improvements;
4. Vacancies followed by lax police protection, causing vandalism;
5. Reduction in refuse collections, street cleaning and street repairs and other city services, giving a slum appearance;
6. Intense building department inspection and citations against owners for any violations of the building code;
7. Notices by the building department to repair, board up or tear down vandalized buildings;
8. Razing of buildings vacant and vandalized giving the

⁵ *Id.* at _____, 136 N.W.2d at 989.

⁶ *Ibid.* *Accord*, *Stinchcomb v. Oklahoma City*, 81 Okla. 250, 198 Pac. 508 (1921) (jury instructions as to compensation paid as of time the commissioners were appointed held erroneous since statute provided that taking took place at the time of the payment of the compensation.)

- area a blighted, deserted and waste land appearance;
9. Refusal by governmental agencies to permit long established licensed businesses to continue in the same building while awaiting the condemnation trial;
 10. Delaying the trial over 10 years, then discontinuing the same, followed by new proceedings with appraisals based on 1962 values of vandalized properties in ruined areas.⁷

The Supreme Court of Michigan stated that if an area had been made a wasteland by a condemnation action, the property owner should not be obliged to suffer the reduced value of his property.⁸ This is the danger involved when there is a time lag during which the above incidents could take place to rob the property owner of his just compensation. The cited case is, of course, extreme. The Supreme Court of Michigan must have had little reservation in returning the case to the lower court for proper adjudication. The case is, however, a clear example of the compensation problem in eminent domain.

Some jurisdictions have updated their procedure so that the date of the taking is established as the filing of the condemnation petition; this is yet a minority rule. "Just compensation for property taken by eminent domain is to be determined as of the date that the condemnation complaint is filed."⁹ This is an attempt to secure adequate compensation, ". . . compensation which will put him in as good financial condition as he was when condemnation petition

⁷ *In re Elmwood Park Project*, *supra* note 4, at _____, 136 N.W.2d at 899.

⁸ A.B.A. Section of Local Gov't Law, *1966 Report of the Committee on Condemnation and Condemnation Procedure*, 141 (1966).

⁹ *City of Phoenix v. Consol. Water Co.*, 101 Ariz. 43, 415 P.2d 866, 870 (1966). See Also, *Times-Mirror Co. v. Super. Ct. Los Angeles County*, _____ Cal._____, 44 P.2d 547 (1935), (where the city was held estopped to dismiss condemnation proceedings when the landowner had relied thereon.)

was filed and nothing short of such award will conform to the constitutional requirement."¹⁰ Although this modern trend in condemnation is coming into use, Oklahoma has retained the older view that, ". . . the need for taking property and extent of taking and compensation for taking are to be judged by conditions existing at the time of taking."¹¹

The procedure of condemnation in Oklahoma is similar to that of Michigan so it is natural that the same dangers exist. Norman Shutler, in his article on condemnation procedure by cities in Oklahoma, outlines the stages as: passing the first resolution determining that acquisition of the property is necessary; determination of the interest to be acquired; determining the owners, negotiations, petition, notice and its publication; appointment of the commissioners; receiving their report; payment of compensation into court; and the jury or court review.¹² The time involved could be as short as thirty days, but the longest time for the process could be similar to *In re Elmwood Park Project*. It is necessary here to remember that the property owner can accept payment at any stage of the negotiations and the action is ended.

A closer examination of the stages used by the cities in Oklahoma is necessary if the proper time of the taking is to be determined. The first two stages are the resolution deciding that acquisition of the property in question is necessary, and determination of the interest to be acquired. These two stages do not involve a taking. The next stage is the determination of the owner, and whether there is a lien or mortgage. Following this there are negotiations with the property owner. "It is indeed startling to note the manner in which

¹⁰ *City of Chicago v. George F. Harding*, Collection, 70 Ill. App. 2d 254, 217 N.E. 2d 381, 383 (1965).

¹¹ *Graham v. City of Duncan*, 354 P.2d 458, 462 (Okla. 1960) Cf. *Tulsa County Drainage District #12 v. Wright*, 196 Okla. 436, 165 P.2d 639, 640 (1946), (the measure of damages is the fair market value of the property at the time it is taken.)

¹² Shutler, *Procedure in Eminent Domain by Cities in Oklahoma*, 14 OKLA. L. REV. 26 (1961).

prices skyrocket when the owner of the property is approached on the subject of its acquisition."¹³ This is the last stage in the entire proceeding in which there is a willing buyer and willing seller. It is the ideal time at which to fix the date of the taking in order that the fair market value be assured.

The next two stages involve the action by the court to acquire that property which was not obtained through negotiations; the property with which this article is concerned. The petition is filed and notice is given the property owner. As to the right by the property owner to challenge the proceedings at this time, "prior to the filing of the commissioner's report no challenge can be heard by the court on the propriety of the proceedings, whether as to the adequacy of the petition regarding the standing of the plaintiff, the right to condemn, or upon any other ground."¹⁴ It can readily be seen that the time of the taking should be established before this stage of the proceedings has been reached.

The last stages of the proceedings are the appointment of the commissioners, the making of their report, and the accession to ownership by the municipality. In making their report the commissioners inspect the real property and consider the injury which the owner may sustain, and assess the damages for the appropriation of his land.¹⁵ The report determines the fair market value of the property and, if accepted by the property owner, is the last stage of the proceedings. When there is dissatisfaction by either party, he may request a jury trial and a more favorable assessment *could* follow. The periods of time between each stage, after the determination of the property to be acquired, is of major importance when the fair market value of the property hangs in the balance. The element of chance must be removed if adequate compensation is to be paid in all cases.

¹³ *Id.* at 28.

¹⁴ *Id.* at 31.

¹⁵ OKLA. STAT. tit. 66, § 53 (1961).

Regarding these steps of condemnation, how does the land value itself fluctuate? Indeed, once a piece of property is labeled for possible condemnation it acquires characteristics that it previously did not have.¹⁶ The article from which the above is taken establishes three points of time in eminent domain proceedings where taking could occur. The first is the discussion of feasibility of a public improvement and its probable location. The second is when the final determination is made as to the location. Between the first and second stages, when it is known only that the improvement is probable but neither its precise neighborhood location nor what parcels of property will be taken, the general trend of property values in the probable area should be upward since the speculative instinct is at work.¹⁷ The third stage of the proceedings, according to the article, is the action of condemnation. After this step the property in the area that is not to be taken retains the increased value, while that property designated to be taken ceases its upward trend and probably starts a downward plunge contingent in part on the expectancy of a small or large offer by the condemnor or the court.¹⁸ A proper award is not made if this falling value is cast off on the property owner who is then made to suffer. The ideal circumstance of the willing seller and the willing buyer in a transaction free from force is lost when the situation creates a decreasing value. Thus, the time chosen as the date of the taking is important. The sooner that date is set, the less chance for any of the inherent dangers to reduce the just compensation due the owner. The article further suggests that the date of the passing of the resolution to take, or the designation of the area as blighted, should be the established time of taking; but adds that these are uniformly held not to constitute a taking.¹⁹

¹⁶ Glaves, *Date of Valuation in Eminent Domain*, 30 U. CHI. L. REV. 319, 327 (1963).

¹⁷ *Ibid.*

¹⁸ *Id.* at 329.

¹⁹ *Id.* at 329.

A recent case, *Housing Authority of the City of Decatur v. Schroeder*,²⁰ also indicates that an early time of taking should be established to protect the property owner. In this case the condemnee was the owner of four duplex apartments in a low rent area. Up to the middle of 1963 the apartments had shown a profit. At this time other properties in the area were being abandoned for an urban renewal project and it was quite clear that the property in question would soon be taken. The rentals immediately decreased and vandalism increased. By May 1964, only two units were rented, and the last tenant moved out on July 1. Two or three months before the petition was filed the property had been posted with a sign saying "Government Property — No Trespassing." By August, one end of the street had been blocked.²¹ The court declared, in deciding the case, that:

{T}he government may not depress the value of land whether by signs causing the public to think the land was already taken, or by public announcements indicating imminent seizure, so as to deprive the owner of the use to which the property is being put, and then contend that the depressed value is in fact the true value of the property on the date the technicalities of taking have been performed.²²

A comparison between this case and the *Elmwood Park Project* case further attests to the fact that the early establishment of the time taking carries with it fewer problems. Comparing the two cases also brings out another point of danger in eminent domain. The government could control the price of the property it needed for a project. The whole proceeding is a balancing of interests: government improvement against the landowner's property rights. With its interest the government enjoys an immunity from attack at all stages. Only where the price must be determined is there a right existent in the condemnee to use the courts. Another author, discussing the immunity the government enjoys in eminent domain action, said: . . .

²⁰ 113 Ga. App. 432, 148 S.E. 2d 188 (1966).

²¹ *Id.* at _____, 148 S.E.2d at 190.

²² *Id.* at _____, 148 S.E.2d at 190.

the immunity from judicial attack of an administrative finding that can be made without a hearing and without any particular study does not seem to be justified by the mere possibility that abuse and delay might result were a contrary rule adopted."²³ It is evident that without so intending the municipality could drive the price of the property down. When the price of the property is established as of the time of the filing of the petition this problem would be solved. The money would be paid into court and the municipality could take possession. All that would remain is the trial where the condemnee could present evidence to fix the final payment.

The country needs eminent domain to continue its growth and urbanization. Government planners have estimated that at least 90% of some 1,175 cities in the United States with population of more than 10,000 have blighted areas that must be replaced.²⁴ The process needs improvements and clear cut rules that will protect the parties. The establishment of the time of the "taking" should be the time when the petition is filed. This is especially so in urban development where business properties and homes are the subject of condemnation. The public will not suffer because there is little chance that the project will be completed in a time period that does not encompass several years. When this is the case, the municipality will have prices established.

To attain the most equitable rule, the price reached in the negotiations should be paid into court, (this being the last time the willing seller is present). Assessment by the Commissioner should be eliminated from the remainder of the process and, "municipal and state authorities should adopt the federal practice providing for payment of an estimated amount of compensation as a condition to vesting title, the exact amount to await the actual trial."²⁵

²³ 48 CALIF. L. REV. 164, 167 (1960).

²⁴ Searles and Raphael, *Current Trends in the Law of Condemnation*, 27 *FORDHAM L. REV.* 529, (1958-1959).

²⁵ *Id.* at 553.

Stated more clearly, the rule should require the immediate payment into court of the price reached by the condemnor in negotiations with final award made by the jury from evidence presented showing conditions before or during negotiations if either side requests. Oklahoma follows this rule partially in allowing for jury review of the commissioner's valuation with 6% interest due from date of taking on the difference between the commissioner's award and the amount of damages assessed by the jury.²⁶ The problem remains that it is the commissioner's report that is used in determining the fair market value. The date of paying the award of the commissioners to the claimant, or into court, is the time for the jury to fix the value of property appropriated and damages to that not taken.²⁷

The main problem is obtaining just compensation for the property owner. It is clear that this is done only with an early date of taking clearly established with no element of time present to affect the final outcome.

In this sense, the value of the property taken is the value to the owner, but courts for reasons of practical administration have adopted market value as the standard of compensation. Nevertheless, this is a justifiable standard only in so far as it attains the true objective of just compensation, that is, to make the owner whole and to distribute the burden and cost of public improvements so that they do not fall too heavily on the shoulders of individual owners. The concern of the courts, as well as of the lawyers, is ultimately to achieve this objective.²⁸

It is submitted that immediate legislation be proposed that will change the time of the taking in Oklahoma to the time negotiations have stopped with the property owner. This is the last stage that the willing seller is present in the

²⁶ *Wilkerson v. Grand River Dam Authority*, 195 Okla. 678, 161 P. 2d 745 (1945).

²⁷ *City of Tulsa v. Horwitz*, 131 Okla. 63, 267 Pac. 852 (1928).

²⁸ Orgel, *Just Compensation*. Bar Ass'n. of New York City, Symposium on the Practical Problems of Condemnation, 4, 10 (1965).

whole proceedings. The commissioners and their report could be deleted with review taken directly to the trial level. The trial would determine the final price to be paid with the difference between the jury award and payment after negotiations added to or subtracted from that price. The benefit received from rearranging the procedure to one similar to this would be the removal of the dangers involved when time passes between the stages of filing the condemnation action and determination of the fair market value.

Gene Mortensen