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CONDEMNATION BLIGHT, DE FACTO TAKING AND ABANDONMENT IN RELIANCE— COMPENSATION OF LOSSES IN URBAN DEVELOPMENT

Compensation for property taken for eminent domain purposes within an urban redevelopment area depends upon many unique valuation factors. Property value losses attributable to city planning activity may be considered in computing an award. In *City of Buffalo v. J. W. Clement Company*,[1] no de facto taking was found, but devaluation flowing from the city's threat of condemnation was compensated.

In 1954, officials of the Buffalo Redevelopment Project first advised Clement that part of the company's extensive printing facilities were located within the area tentatively designated for urban renewal appropriation. Subsequent "official" statements significantly affected Clement's decision to relocate. Early in 1963, the city scheduled the purchase for May. In good faith reliance, Clement completed its move to the new location by April 1, 1963. Acquisition did not occur as planned and the property could be neither sold nor rented after 1963. As legal owner, Clement continued to bear the cost of taxes, insurance and maintenance until title vested in the city by judicial proceedings in 1968.

Clement sought relief under a theory of de facto taking, asserting effective city ownership of the property as of 1963. The company's compensation under that claim might have included the market value of the property at the date of alleged taking,[2] interest on the market value award from 1963[3] and proprietary expenses paid by Clement after 1963. The appellate division affirmed the trial court's finding of a taking of the property as of April 1, 1963. The court declared that the city's acts, such as threat of condemnation, established a de

1. 28 N.Y.2d 241, 269 N.E.2d 895, 321 N.Y.S.2d 345 (1971).

2. United States v. Petty Motor Co., 327 U.S. 372, 377-78 (1946); *In re* Board of Water Supply, 277 N.Y. 452, 456, 14 N.E.2d 789, 791 (1938).

3. Jacobs v. United States, 290 U.S. 13, 17-18 (1933); *In re* Bronx River Parkway, 284 N.Y. 48, 54-55, 29 N.E.2d 465, 468 (1940), *aff'd per curiam sub nom.* A.F. & G. Realty Corp. v. City of New York, 313 U.S. 540 (1940).

facto taking "inasmuch as the City's acts forced Clement to move from its property at that time. . . ."[4] The New York Court of Appeals expressly rejected the lower courts' findings of a de facto taking and adhered to the traditional definition[5] that such acquisitions are confined to situations "involving a direct invasion of the condemnee's property or a direct legal restraint on its use. . . ."[6]

When a proper legal proceeding establishes a taking,[7] compensation must be granted.[8] The fundamental consideration in compensating, according to the *Clement* court, is that the award must be "just" both to the owner whose property is taken and to the taxpaying public which pays for the taking.[9] Two theories of compensation were considered in *Clement*: de facto taking (as to loss of use) and "condemnation blight" (as to loss of value).

When a de facto taking is declared to have occurred before formal appropriation, compensation for the value of the property at the earlier date is awarded with interest. In essence, such a taking advances the recognition of acquisition from the date of the formal proceedings to the date of the actual appropriation. The certainty which the law demands militates against finding a taking for claims predicated on subjective decisions. Even though an abandonment may have been induced, no taking occurs when an owner relinquishes his property due to a threat of condemnation.[10] Abandonment may be argued to be unnecessary absent legal compulsion.

The city never compelled Clement to relinquish its use of the property until the 1968 condemnation trial, although the threat of

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4. City of Buffalo v. J.W. Clement Co., 34 App. Div. 2d 24, 31-32, 311 N.Y.S.2d 98, 106 (1970).

5. Keystone Associates v. Moerdler, 19 N.Y.2d 78, 88, 224 N.E.2d 700, 703, 278 N.Y.S.2d 185, 189 (1966); Forster v. Scott, 136 N.Y. 577, 584, 32 N.E. 976, 977 (1893); Selig v. State, 20 Misc. 2d 33, 37, 194 N.Y.S.2d 833, 837 (Ct. Cl. 1959). *See also* 2 P. NICHOLS, EMINENT DOMAIN § 6.2 (3d ed. 1950) [hereinafter cited as NICHOLS].

6. 28 N.Y.2d at 253, 269 N.E.2d at 902, 321 N.Y.S.2d at 356.

7. *See, e.g.*, N.Y. CONDEM. LAW art. 2 (McKinney 1950).

8. *See, e.g.*, N.Y. CONST. art. I, § 7 (McKinney 1950).

9. Searl v. School Dist. No. 2, 133 U.S. 553, 562 (1889), *cited in* New York O. & W.R. Co. v. Livingston, 238 N.Y. 300, 306, 144 N.E. 589, 591 (1924), *and in* City of Buffalo v. J.W. Clement Co., 28 N.Y.2d at 255, 269 N.E.2d at 903, 321 N.Y.S.2d at 357.

10. Hempstead Warehouse Corp. v. United States, 98 F. Supp. 572, 573 (Ct. Cl. 1951); 2 NICHOLS § 6.1(1). *See also* Danforth v. United States, 308 U.S. 271, 283-86 (1939); United States v. Sponenbarger, 308 U.S. 256, 267 (1939).

condemnation strongly suggested reliance and pragmatic relocation in 1963. Clement's claim flowed from the theory of a 1963 taking, but since the court of appeals found no taking at that date, relief under that theory was necessarily denied.

An award for condemnation blight compensates a property owner for the devaluation caused by the condemning authority's "affirmative value-depressing acts"[11] such as a threat of condemnation. *Clement* illustrates how the announcement of a redevelopment project and the likelihood of condemnation can lead to a drastic reduction of property values in the affected area. The governmental prerogative of eminent domain can preclude private use of land, rendering it virtually valueless at market. The court of appeals remanded *Clement* for a determination of the extent of condemnation blight and directed that such an award be made.

Fundamentally, the question of compensation for condemnation blight devaluation is whether or not a particular loss was "caused" by a government project.[12] Jurisdictions differ in their treatment of property devaluation arising after the announcement of a government project and before the condemnation trial.

The stricter rule is that market value is assessed at the date of taking, *i.e.*, at the time of the condemnation proceedings.[13] The only compensation permitted is the depressed market value. If devaluation occurred before the legal transfer of title it was simply an injury "necessarily incident to the ownership of property within a municipality possessing the power of eminent domain, which may indirectly impair its value but for which the law does not and never has afforded relief."[14] Under this approach, government activity is but

11. 28 N.Y.2d at 258, 269 N.E.2d at 905, 321 N.Y.S.2d at 359, *citing* City of Buffalo v. George Irish Paper Co., 31 App. Div. 2d 470, 476, 299 N.Y.S.2d 8, 14 (1969), *aff'd*, 26 N.Y.2d 869, 258 N.E.2d 100, 309 N.Y.S.2d 606 (1970). *See also* City of Detroit v. Cassese, 376 Mich. 311, 136 N.W.2d 896 (1965); 4 NICHOLS § 12.3151.

12. Glaves, *Date of Valuation in Eminent Domain*, 30 U. CHI. L. REV. 319, 340 (1963).

13. Weintraub v. Flood Control Dist., 104 Ariz. 566, 456 P.2d 936 (1969); Housing Authority v. Schroeder, 222 Ga. 417, 151 S.E.2d 226 (1966); Chicago Housing Authority v. Lamar, 21 Ill. 2d 362, 172 N.E.2d 790 (1961); Land Clearance for Redev. Authority v. Morrison, 457 S.W.2d 185 (Mo. 1970); Sorbino v. City of New Brunswick, 43 N.J. Super. 554, 129 A.2d 473 (Law Div. 1957); Houston v. Biggers, 380 S.W.2d 700 (Tex. Civ. App. 1964).

14. Eckhoff v. Forest Preserve Dist., 377 Ill. 208, 212, 36 N.E.2d 245, 247 (1941); *accord*, Sorbino v. City of New Brunswick, 43 N.J. Super. 554, 129 A.2d 473 (Law Div. 1957).

one of the "myriad influences" on the market value.[15] States which follow the strict rule, therefore, deny liability for a correlation between the appropriation process and any property devaluation which might occur.

Alternatively, two Supreme Court cases indicate the more liberal view and establish the federal rule. In *United States v. Miller*[16] an area was specified for government acquisition and some of the land was condemned. The remaining property then increased in value due to speculation "as to what the Government would be compelled to pay as compensation."[17] When condemnation did occur, the enhancement in value attributable to the project was excluded from the just compensation award in the interest of fairness to the condemnor. Conversely, in *United States v. Virginia Electric & Power Co.*,[18] the Court cited *Miller* as authority for the proposition that an award "must exclude any depreciation in value caused by the prospective taking once the Government 'was committed' to the project."[19] The opinion continued by quoting one writer's observation that

> '[i]t would be manifestly unjust to permit a public authority to depreciate property values by a threat . . . [of the construction of a government project] and then to take advantage of this depression in the price which it must pay for the property' when eventually condemned.[20]

Accordingly, many jurisdictions do not consider value fluctuations caused by the announcement of a government project.[21] The effect of

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15. United States v. Certain Lands, 47 F. Supp. 934 (D.C.N.Y. 1942).

16. 317 U.S. 369 (1942).

17. *Id.* at 377.

18. 365 U.S. 624 (1961).

19. *Id.* at 636.

20. *Id., citing* 1 L. ORGEL, VALUATION UNDER EMINENT DOMAIN 447 (2d ed. 1953). *See also* 2 J. LEWIS, EMINENT DOMAIN 1329 (3d ed. 1909).

21. State Road Dep't. v. Chicone, 158 So. 2d 753 (Fla. 1963); Indiana v. Sovich, 252 N.E.2d 582 (Ind. 1969); Tharp v. Urban Renewal & Community Dev. Agency, 389 S.W.2d 453 (Ky. 1965); Congressional School of Aeronautics, Inc. v. State Roads Comm'n, 218 Md. 236, 146 A.2d 558 (1958); Lipinski v. Lynn Redev. Authority, 355 Mass. 550, 246 N.E.2d 429 (1969); Housing & Redev. Authority v. Minneapolis Metropolitan Co., 273 Minn. 256, 141 N.W.2d 130 (1966); Brainerd v. New York, 74 Misc. 100, 131 N.Y.S. 221 (Ct. Cl. 1911); Cleveland v. Carcione, 118 Ohio App. 525, 190 N.E.2d 52 (Ct. App. 1963). *See also In re* Appropriation of Property of Bunner, 28 Ohio Misc. 165,

the proposed activity on the market value is eliminated by compensating to the extent of the property's fair market value just before the value-affecting announcement.[22] The reason for the rule is that "the landowner is not to be penalized for any depreciation in value attributable to the public's learning of the condemnation, nor is the condemnor to be required to pay for any enhancement in values which may be attributable to the proposed project."[23] The court of appeals in *Clement* recognized municipal liability for condemnation blight, maintaining New York as one of the liberal compensation jurisdictions.

Those courts granting blight compensation view compensable effects conservatively, however, to the detriment of property owners.[24] An award for condemnation blight is restricted to devaluation in the property's fair market value[25] and does not include compensation for interest on the award from the time that the blight began.[26] To avoid

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171, 276 N.E.2d 677, 681-82 (Prob. 1971); 4 NICHOLS § 12.3151; Comment, *Recovery for Enhancement and Blight in California*, 20 HASTINGS L.J. 622, 643-49 (1969); Committee on Condemnation Law, *Draft of Model Eminent Domain Code*, 2 REAL PROP., PROB. & TR. J. 365 (1967):

> Sec. 604 Effect of Imminence of Condemnation
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> Any change in the fair market value [of real estate] prior to the date of condemnation which the condemnor or condemnee establishes was substantially due to the general knowledge of the imminence of condemnation, other than that due to physical deterioration of the property within the reasonable control of the condemnee, shall be disregarded in determining fair market value.

Id. at 381.

22. State Road Dep't v. Chicone, 158 So. 2d 753, 758 (Fla. 1963).

23. Tharp v. Urban Renewal & Community Dev. Agency, 389 S.W.2d 453, 456 (Ky. 1965).

24. Glaves, *supra* note 12.

25. 4 NICHOLS § 12.3151[5]. *See also* United States *ex rel.* Tennessee Valley Authority v. Powelson, 319 U.S. 266 (1943):

> It is a well-settled rule that while it is the owner's loss, not the taker's gain, which is the measure of compensation for the property taken . . . not all losses suffered by the owner are compensable under the Fifth Amendment. In the absence of a statutory mandate . . . the sovereign must pay only for what it takes, not for the opportunities which the owner may lose.

Id. at 281-82; Niagara Frontier Bldg. Corp. v. New York, 33 App. Div. 2d 130, 305 N.Y.S.2d 549 (1969), *aff'd*, 28 N.Y.2d 755, 269 N.E.2d 912, 321 N.Y.S.2d 368 (1971).

26. The significance of the court's refusal to find a 1963 de facto taking is demonstrated, in part, by reference to the amount of interest to be awarded Clement on the value of the property. Interest is proportional to the time of

some of the restrictions on compensation, a complainant might contend that a de facto taking had occurred at the time condemnation blight began to adversely affect the subject property and that it deprived him of the use of the property. The taking approach was unsuccessful in *Clement.*

Therefore, the issue in jurisdictions granting condemnation blight awards is to determine when a "taking" occurs. Can the date on which condemnation blight begins (or is aggravated substantially by governmental action) establish a date of de facto taking or does the date of the condemnation trial invariably establish the formal taking date as being some time after the condemnation blight began (unless there is municipal legal interference)? Under the latter view, the date on which condemnation blight began is significant only in establishing the date of valuation for compensation purposes.

The *Clement* opinion indicates that New York, following the traditional rule, will recognize a de facto taking only in those limited situations

> involving a direct invasion of the condemnee's property or a direct legal restraint on its use. . . . It is our view that only the *most obvious injustice* compels such a result. The Appellate Division, discerning so substantial an interference with the use of the subject property, found the essential elements of ownership to have been destroyed and held that the city's action constituted a de facto taking. We firmly disagree with that determination.[27] (Emphasis added.)

The court reiterated that a de facto appropriation requires "a *legal* interference with the physical use, possession or enjoyment of the property or a *legal* interference with the owner's power of disposition of the property."[28] The court's reference to *legal* interference is most significant: Clement's relocation was induced by representations of future condemnation made merely by various officials rather than authoritatively by a court. Evidently, in the opinion of the New York Court of Appeals, this situation was not an "obvious injustice" which would have required the finding of a taking.

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taking, so had the taking been declared as of 1963, the interest would have been over $400,000 greater than the amount granted for a 1968 taking. 28 N.Y.2d at 254-55, 269 N.E.2d at 903, 321 N.Y.S.2d at 356-57.

27. *Id.* at 253-54, 269 N.E.2d at 902, 321 N.Y.S.2d at 356.

28. *Id.* at 255, 269 N.E.2d at 903, 321 N.Y.S.2d at 357 (emphasis added).

On similar facts, however, other jurisdictions have found a taking to have occurred. *City of Detroit v. Cassese*[29] involved a situation where, in 1950, the city began a condemnation project, informed persons in the area of the plans, filed a *lis pendens*, then ten years later abandoned the project, only to begin another action in 1962. The property owner sought compensation for a 1950 taking, and the Michigan Supreme Court agreed that it was due since

> many of the acts alleged by appellant, if so performed,—such as sending letters to tenants ["causing" them to move], filing *lis pendens*, intense building department inspection and citations against owners for any violations of the building code, and, finally, refusal to permit a long-established business to continue in a building because it was going to be condemned . . . would constitute a taking.[30]

The court's language would suggest that several of the governmental acts on the list would be sufficient to constitute a taking.

The *Cassese* case is distinguished from *Clement* based on the former's allegation of " '[r]efusal by governmental agencies to permit long established licensed businesses to continue in the same building while awaiting the condemnation trial.' "[31] The *Clement* court probably would have found a de facto taking had Clement been subjected to such treatment, in that forced relocation would be a legal interference with the property owner's prerogatives.[32]

Part of the reason for finding a de facto taking only when there has been a legal interference is to facilitate the administration of condemnations and to establish clearly the amount of condemnation awards. When a court declares that a taking occurs only when there

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29. 376 Mich. 311, 136 N.W.2d 896 (1965).

30. *Id.* at 318, 136 N.W.2d at 900. The court phrases the formula for compensating a de facto taking as follows:

> First, the date of taking should be determined. Next, the value of the property as of that date is to be ascertained. There should be deducted from the award any amounts that accrued to the owner from his possession of the property or that reflect the value of its use following the taking. In [*Cassese*] this would consist of the rentals . . . less any expenses in connection with maintenance, upkeep or repossession, of the properties, such as water and light bills, insurance, taxes, etc. Finally, interest should be added from the date of taking to the date of award.

Id. See In re Petition of State Highway Comm'r, 279 Mich. 285, 296, 271 N.W. 760, 764 (1937).

31. 376 Mich. at 317, 136 N.W.2d at 900.

32. 28 N.Y.2d at 255, 269 N.E.2d at 903, 321 N.Y.S.2d at 357.

is a physical invasion, legal appropriation or legal restraint, the effective date is certain. Less definable dates (such as the date on which Clement decided was most prudent to relocate) are subject to administrative problems of deciding whether a "taking" occurred. Interest is proportional to the time of taking[33] and is granted due to the owner's relinquishment of use; when the owner vacated, did he do so in good faith or did he vacate early in order to get a greater amount of interest on his condemnation award?

Fewer administrative problems arise in awarding condemnation blight compensation; no interest is included in the award because condemnation blight goes only to the loss of value and not to the loss of use. Therefore, as a matter of administration, courts will more readily grant an award for blight than for a de facto taking.

The concept of just compensation developed in the nineteenth century when the problems of urban redevelopment condemnations were not a concern. Since much of the property taken in the 1800's was undeveloped, owners incurred few losses not compensated by the market value.[34] Today the owner of a highly developed area may have to relinquish much more than what a condemnor takes since not all real losses are compensated under traditional theories. For instance, as condemnation blight afflicts an area, sites within that area may become essentially uninhabitable. Unless a legal interference by the government causes a de facto taking, however, the legal fiction holds that the owner incurs no loss of use of his property. For practical purposes he may not utilize his property, but for legal purposes his dominion is unaltered. Societal standards of compensation do not develop concurrently with new categories of injuries.

Real detriments such as loss of use, taxes, maintenance and insurance expenses fell on Clement primarily due to reliance on the city's actions. Notice in advance of appropriation and reliance on that notice were business necessities for Clement in order to move its massive equipment by the city's specified date. The element of subjectivity in Clement's decision was minimal in light of the city's overbearing land-use prerogatives. Urban renewal projects are subject to unforeseen delays, but it is of questionable equity to place the burden

33. *See* note 26 *supra.*

34. Spies & McCoid, *Recovery of Consequential Damages in Eminent Domain*, 48 VA. L. REV. 437, 442-43 (1962). *See also* Note, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 65 (1957).

of planning errors on companies whose reliance the city may have induced.

Municipal authorities should be held to a stricter standard of care to minimize the loss of land use. Secrecy in planning would be undesirable,[35] but officials should be held to some degree of accountability. Incorrect planning advice by a city and subsequent stringent compensation could undermine the city's image of legitimacy.[36] Also, insufficient settlements could arouse popular indignation and thereby impede further redevelopment programs.[37]

With these considerations, the possibility of finding a de facto taking should be examined seriously when a threat of condemnation induces pragmatic reliance and the owner's abandonment was in good faith.[38]

Clement is important in that the court rigidly adhered to the traditional definition of de facto taking despite persuasive exigencies suggesting an expansion of the concept. The decision goes beyond the taking issue to the fundamental propriety of the city threatening condemnation and promoting reliance. The condemnor was not held directly accountable for the adverse effects of an induced abandonment, while compensation was granted for that property market value decline which was attributable to the government project. Reliance was "necessary" for the company to comply with the city's acquisition schedule as announced, but it was not legally "necessary;" thus, a de facto taking was declared not to have occurred as a matter of law.

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35. Municipal covertness "'. . . would but raise [greater] havoc with an owner's rights.'" 28 N.Y.2d at 256, 269 N.E.2d at 904, 321 N.Y.S.2d at 358, *citing* City of Buffalo v. J.W. Clement Co., 34 App. Div. 2d 24, 39, 311 N.Y.S.2d 98, 114 (1970) (Gabrielli, J., dissenting).

36. Comment, *Never Trust a Bureaucrat: Estoppel Against the Government*, 42 S. CAL. L. REV. 391, 403 (1969).

37. Note, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 64, 92 (1957).

38. *See* Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964). "The formal appropriation or physical invasion theory should be rejected once and for all." *Id.* at 48.