ENHANCED VALUE RESULTING FROM PROPOSED IMPROVEMENT — CONDEMNATION

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In anticipation of a proposed public improvement, land values in and around the project very often increase between the time of the public announcement or the speculation of such announcement and the actual taking of the lands in a condemnation proceeding. The question which results, is whether this specific increment in the value of the land to be condemned for the project is a proper element for consideration in arriving at an amount that is just and adequate to compensate the owner.

The major part of the authority in the United States on this point holds contrary to the Georgia decisions and therefore raises a question of the propriety of the Georgia position.

In 1911 the Georgia Supreme Court in the case of *Gate City Terminal Company v. Thrower,*[1] held:

> If, at the time the market value of the property sought to be condemned was to be estimated, it was known or anticipated that certain improvements would be made in the locality where the property was situated, and this fact served to enhance the market value of the property, the owner would be entitled to the actual market value as affected by reason of the fact that it was known or anticipated that such improvements would thus be made. This is true though the projected improvements were to be made by the condemning party.

It is this opinion that has directed the Georgia decisions, and a closer look at the language used in this opinion shows that it does not necessarily sustain the present Georgia rule. The court states:[2]

> At the time the maket value of the property was to be estimated on April 20, 1907, it was known, or at least anticipated, that the railroad and terminal station would be constructed *in the locality* where this property was situated. Where improvements *in any locality* of a certain kind, if made, would enhance the value of property *in that locality,* and a party having the right of eminent domain begins such improvements, and because of its being known or expected that the improvement will be carried to completion the market value of the property *in that locality* is enhanced, the party seeking to condemn such property cannot object to being made to pay the actual market value of it, *before taking it,* because it has been enhanced by

1. 136 Ga. 456, 71 S.E. 903 (1911).
2. *Supra* n. 1.

> reason of the fact that the improvements which are known or expected to be made will be made by the condemning party. See *Harrison v. Young,* 9 Ga. 359; *Young v. Harrison,* 17 Ga. 30; s.c. 21 Ga. 584. (Emphasis added)

Neither the above quote nor the remainder of the *Gate City*[3] decision support the view that a jury may consider any enhancement in value "in the locality" after the specific area for the improvement has been designated and becomes public knowledge.

It is at this point that the Georgia rule leaves all supporting authority from other jurisdictions. Though most of the states allow no evidence of increased value resulting from the proposed project, some authorities sustain a consideration of such increase before the area to be taken is specifically designated. This factor is recognized by Nichols in his treatise on eminent domain[4] where he states:

> The general rule is that any enhancement in value which is brought about in anticipation of and by reason of a proposed improvement is to be excluded in determining the market value of such land, although there is some authority which contrawise, unqualifiedly allows recovery for such enhanced value. [at this particular point Nichols cites the *Gate City Terminal* case, *supra.*]
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> If it is known from the very beginning exactly where the improvement will be located, if it is constructed at all, the property that will be required for its site will not participate in the rise or fall in value, for, since such property is bound to be taken if the improvement is constructed, it can never by any possibility either suffer from or enjoy the effects of the maintenance of the public work in its neighborhood; and consequently it is well settled that in such case in valuing the land the effect of the proposed improvement upon the neighborhood must be ignored. . . .
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> The enhancement of price due to the public improvement, if based on the reasonable expectation that the lands may be held by the private owner with the added advantages of adjacency to the land improved by the public is legitimate; but when this expectation is destroyed by the practical certainty as distinguished from the legal certainty that the lands are not to continue in private ownership adjacent to the public lands, then the reason for allowing such enhancement fails. The rule has been stated to be that the owner of the land taken by eminent domain is not entitled to recover any increase in the value of such land where the fact is that the land was known to be within the area designated for condemnation and was certain to be taken.

3. *Supra* n. 1.
4. 4 Nichols, *Eminent Domain* §12, p. 315 (3rd ed. 1951).

Another factor that apparently is not separated in the Georgia decisions on this point is the general rule that the highest and best use to which any land may be put is a valid consideration in arriving at adequate compensation. It is to this factor that the decision of *Young v. Harrison*[5] addresses itself and it is this case that is cited in the *Gate City*[6] opinion as sustaining authority. In *Young v. Harrison*,[7] the owner was using the land for a ferry crossing and the condemnor was condemning the land for a bridge site. The case held:

> that the value and damage, at the time the land was taken, was a thing to be ascertained; but that to discover this, the jury was authorized to look to the prospective value of the property as a bridge site, and to take that into consideration also in determining what it was then worth.

The connection between this and the *Thrower* case was that the railroads had already developed in the area of Thrower's land and the Gate City Terminal Company was condemning his land to further railroad activity.

A case which considers both the factor of evidence concerning the highest and best use of the land as well as the problem of improvements to be made by the condemnor was *Central Georgia Power Company v. Stone*[8] which may help to distinguish these two problems. There the court stated:

> In condemnation proceedings, as to land taken, the question is, what is its market value? The market value is the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who wishes to buy, but is not under a necessity to do so. In determining what this market value is, the jury is not confined to considering the use to which it is actually being put by the owner. He may have used a valuable corner for a stable or for a pig sty. But he is not obliged to have it priced on that basis. The character, location, size, and shape of the property, and its availability for different uses may be shown. A corner lot in a town may be proved to be adapted to use as a garden, or as a location for a residence, or for a site for a store or office building. This may not only increase the number of probable buyers, but also the probable price which a buyer would pay for it. If it were proved that the lot had a coal or iron deposit under the surface, this would be for consideration in estimating the market value. And so of other possible elements, such as suitability for a bridge site or a dam or reservoir. These would not furnish separate items for recovery, but would be legitimate for considera-

5. 6 Ga. 130 (1849); 9 Ga. 359 (1851); 17 Ga. 30 (1855).
6. *Supra* n. 1.
7. *Supra* n. 4.
8. 139 Ga. 416, 77 S.E. 565 (1913).

tion in estimating market value. *Harrison v. Young,* 9 Ga. 359; *Central Georgia Power Company v. Mays,* 137 Ga. 120 (72 S.E. 900), and citations. But this is an entirely different thing from undertaking to prove that the condemnor can spend so much money in improvements, or in a business to be established on the land, and can make an estimated profit, and estimating the market value on the basis of prorating the contribution of the landowner to the total result. To enter into the possibilities of profitable or unprofitable investments, or success or failure of a business enterprise, would be to lose sight of the main issue and become entangled in a maze of collateral questions. The owner who would like to show the possible profits of the condemnor, as a means of increasing the estimate of the market value of the land taken, would hardly be willing to have the market value decreased by showing that the enterprise involved large risks and might not be profitable for a long time, if at all, and that the owner of the land taken should share losses as well as the probable profits. p. 419

Again, he charged that the jury might take into consideration 'the intrinsic, potential value, if any such appears, for the storage of water for a water-plant by the plaintiff or any other person.' Again he referred to the 'potential value for the storage of water, . . . whether that was dependent upon the property alone, or dependent in connection with property owned by others or dependent on improvements contemplated or being made by the plaintiff in this case.' And he further charged that if certain improvements were being made in the locality where the property was situated, and the fact of these improvements showed the adaptability of this property for valuable uses, and this fact enhanced the market value of the property, the owner would be entitled to such market value as affected by these improvements, 'though such improvements were at the time being made by the plaintiff in this case.' This also was apparently based on the inadmissible evidence of the experts. Moreover, the Court seems to charge that if the condemnor had started its dam, it must pay more for the property. In 15 Cyc. 757, it is said: 'Compensation must be reckoned from the standpoint of what the landowner loses by having his property taken, not by the benefit which the property may be to the other party to the proceedings; therefore the value of a particular piece of land to a person or corporation exercising the right of eminent domain, or the necessities of that particular person or corporation to acquire that piece of property for the particular purpose, cannot be considered as an element of damage to the landowner. . . . There is a recognized difference between estimating damages by the value of the property to the person or corporation exercising the right of condemnation and considering the availability or adaptability of a piece of land for the purpose for which it is condemned as an element of value which would attract any buyer for that purpose. The true rule

> is that any use for which the property is capable may be considered; and if the land has an adaptability for the purposes for which it is taken, the owner may have this considered in the estimate, as well as any other use of which it is capable. Thus, in proceedings to condemn land for railroad purposes, for a bridge site, or for a reservoir or water-supply, it may be shown that the land has an especial availability which would render it for railroad purposes, for a bridge site, or for the purpose of a reservoir or water-supply, and the owner may insist upon this availability of his land for the particular purpose as an element in estimating its value. pp. 421-422.

The most recent Georgia decision extends the Georgia rule far beyond early authority and is contrary to the majority view in our country. It is *Hard v. Housing Authority of the City of Atlanta.*[9] This decision overrules the Court of Appeals case of *Housing Authority of the City of Atlanta v. Hard,*[10] and holds that:

> Evidence showing an enhancement in its value resulting from the previously announced intention of the condemnor to take an area which includes the subject land for urban renewal is admissible, and it is not error to charge the jury to consider such evidence in fixing its value.

The Supreme Court in this decision approved a charge given by the trial judge that in substance,

> instructed the jury that the owner of land taken for public use can recover therefor an enhanced value which it had acquired merely by reason of the taking or as a result of that particular land for the specific purposes for which it is taken contemplates.

In so ruling the Court stated that it was obeying the commands of art. I §3, par. 1 of the *Constitution of Georgia*[11] which in effect says that just and adequate compensation must be first paid. This requirement follows the federal mandate contained in the fifth amendment and says "no person shall be deprived of life, liberty or property without due process of law nor shall private property be taken for public use without just compensation."[12]

The federal rule on this particular question follows the majority rule as expressed in the quotation from Nichols.[13] The federal courts do not allow a property owner to claim an increased market value for his

9. 219 Ga. 74, 132 S.E.2d 25 (1963).
10. 106 Ga. App. 854, 128 S.E.2d 533 (1962).
11. GA. CODE ANN. §2-301. CONSTITUTION OF GEORGIA 1945.
12. GA. CODE ANN. §1-805.
13. *Supra* n. 1

land merely because lands that are adjacent to the project but are not condemned for the project have had an increase in market value due to their proximity to the proposed project. In the case *United States of America v. Miller,*[14] the United States was condemning land to be used for railroad tracks for the Central Pacific Railroad. Justice Roberts wrote in that particular opinion:

> If a distinct tract is condemned in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the government at a later date determine to take these other lands it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning 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 any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent land not immediately taken increased in value due to the projected improvements.

This same view was expressed in the 5th Circuit case of *Tigertail Quarries, Inc. v. United States,*[15] where the United States Government condemned a large tract of land in May of 1942, and later the Government came back and condemned a smaller tract of land in September of 1942. The property owner attempted to claim an increased market value as a result of the first condemnation. The Government, however, demonstrated that the original map of the project at the time of the first condemnation showed not only the land condemned originally but also the smaller tract which the Government was condemning at that time. Therefore, the court held that no increase in value could be claimed by the property owner as a result of the first taking and that it was improper for the court to allow any consideration of this factor.

In *Anderson v. United States*[16] the court held:

> . . . we think that the court can judicially know that the establishment of government projects generally tend to bring about an increase in market value of lands within the project, but even if that is not the case here, the policy of the law is such as to operate against requiring the government to pay such increase due to such a reason. On the other hand, if the project were undesirable, the value of the land would likewise be lessened after its establishment, with attendant unfairness to the land owner.

14. 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336 (1943).
15. 143 F.2d 110 (1944).
16. 179 F.2d 281 (5th Cir. 1950).

The analogy used in this opinion is almost exactly the same as that used in the *Central Georgia Power Co. v. Stone*[17] decision and apparently the Georgia court has not recognized this limitation on the *Thrower*[18] rule in deciding the *Hard*[19] case.

The majority rule as expressed in these federal court opinions is followed generally throughout the United States. One of the leading cases is that of *Smith v. Commonwealth.*[20] In that opinion the court states at page 668:

> The instruction, to the effect that the value of the land was not to be enhanced by reason of the fact that it was known to be within the area designated for the reservation and was certain to be taken for it was correct. The compensation to which an owner of land taken by eminent domain is entitled to its fair value in the market for beneficial use. If it is in the neighborhood of, but not included within the limits of the public improvement its value for use in connection therewith may be enhanced, but if it is to be taken for the improvement, it can have in the nature of things, no increase or scope for valuable use in private ownership. The certainty of a right to petition for damages for its appropriation by eminent domain is not a valuable use of land.

In *Bonepart v. Mayor and City Council of Baltimore*[21] the main issue involved was the consideration of a use of the property different from that to which it was presently being put. The court, however, stated in its opinion the following, which is of value to us in our consideration:

> Its market value depends upon the uses for which it is available and any specific utility which may tend to enhance its value in the market is a proper element to be considered. The availability of the property for a particular use, contributing to its market value is not to be ignored merely because it has not in fact been applied to that use. The valuation for condemnation purposes must disregard the affect of the public project for which the property is acquired but must take into consideration all the uses to which it is capable of being applied at the time of the appropriating and affect its marketability.

In an Alabama case, *Housing Authority of Birmingham v. Title Guaranty Loan & Trust Company*[22] the court stated:

> Nor does it require any argument or citation of authority to

17. *Supra* n. 8.
18. *Supra* n. 1.
19. *Supra* n. 9.
20. 210 Mass. 259, 96 N.E. 666 (1911).
21. 131 Md. 80, 101 A. 594 (1917).
22. 243 Ala. 157, 8 So.2d 835, 838 (1942)

> demonstrate the inadmissibility of testimony tending to show the valuation of the property as enhanced by the contemplated improvement as a consequence of the condemnation proceeding.

Another case which considers our problem and disposes of it almost as quickly in a New Jersey case, *Yara Engineering Corporation v. City of Newark*[23] where the court states:

> In reaching the market value, consideration must be given to all uses to which the land may be put and the owner be given the benefit of the best and most valuable use. But the special value of the land to the City or to the United States as distinguished from others who may or may not have the power to condemn, must be excluded.

The Massachusetts court in the case of *Mowry v. City of Boston*[24] stated:

> The owner of land taken for public use cannot recover therefor an enhanced value which it has acquired merely by reason of the taking, or as the result of the improvement which the taking of that particular land for the specific purposes for which it is taken contemplates; for, from the very nature of things its appropriation is a condition precedent to the existence of the improvement, and it cannot share in the effect of a change to create which it must be used.

Further authority that holds *contra* to the Georgia rule can be found from most of the jurisdictions in our country and many are included in an annotation in 147 A.L.R. 55, some few of which concur with the Georgia Rule.

The Georgia Supreme Court recognized the lack of authority supporting their opinion in the *Hard*[25] case and quoted this part of the opinion in *Green v. Coastline Railroad Company*:[26]

> Every direct authority known to us is against us; nevertheless, we are right and these authorities are all wrong, as time and further judicial study of the subject will manifest.

In assessing the authority which sustains the majority opinion in our country it is plain that in ascertaining market value no evidence is allowed which indicates an increase resulting from the public speculation concerning the proposed improvements to take place in the condemned area where the property has been, to quote the language of the Supreme Court, "probably" selected or as was said in *United States v. Miller*[27] "was committed" to the project. To hold *contra* to this position, as

23. 136 N.J.E. 513, 42 A.2d 632, 638 (1945).
24. 173 Mass. 425, 53 N.E. 885 (1899).
25. *Supra* n. 9.
26. 97 Ga. 15, 24 S.E. 814 (1895).
27. *Supra* n. 14.

Georgia now appears to do, opens the door for the public treasury to be drained in paying for property for public projects. As took place in the *Thrower*[28] case where the condemnor gave proper notice and began proceedings to condemn certain property on August 14th of 1906 and thereafter on September 1st of 1906 the defendant, Thrower, obtained a temporary restraining order enjoining the proceedings, it was not until April 20th of 1907 that the property was actually taken. Therefore, the condemnee had delayed the proceedings for almost eight months. Under the Georgia law, any increase in the market value of the property in the area in which the particular parcel to be condemned was located is admissible in arriving at the market value of the property to be condemned. It appears impossible to justify the taxpayer being required to pay a property owner not only just and adequate compensation, but in addition thereto, an amount created by the speculation in adjoining and surrounding property during an eight-month delay.

Certainly no one would maintain that if property values decreased as a result of a projected improvement by a condemning authority, that property should be damaged by such fact. As was observed in *Lewis on Eminent Domain,* para. 745,

> If the proposed improvement had depreciated the value of the property, it would be very unjust that the condemning party should get it at is depricated value, and the correct value rule would seem to be that the value should be estimated irrespective of any effect produced by the proposed work. It has been held improper to consider what the property would have been worth if it could have had the benefit of the proposed improvement without being taken.

The admission of this type of evidence to a jury whether the evidence is for or against the condemnor or the condemnee can certainly be said to do only one thing and that is confuse the issue of fair market value. In addition, the jury is allowed to consider a value which has been falsely arrived at in that property included in a project after the announcement of such project cannot possibly increase in value other than by mere speculation as to the amount that the condemnor will be required to pay the property owner. No individual would purchase property which had been designated for condemnation, and to say that a prospective buyer under no pressure to purchase from a prospective seller under no pressure to sell would pay $10,000 for one piece of property before it was designated to be condemned and later after its designation in a project to be erected by a condemnor the same purchaser would

28. *Supra* n. 1.

pay $16,000 for the same piece of property is to create a false value for the consideration of a jury.

Certainly there must be some method of arriving at just and adequate compensation which is equally just and fair to the taxpayer who must purchase such property. No one would argue that a condemning authority should be allowed to announce its intention to condemn specific property, to then wait two, three or five years before it actually condemns the property and yet be required to pay only the value of the property that has been created by the stagnant condition brought about by the condemnation announcement. Equally as unfair is the situation which forces the condemnor to pay an increased value created by the speculation resulting from its announcement to condemn a specified area. Where a public improvement has been developed in an area and later a condemning authority returns to the same area to take additional land for another project, then the law plainly states that the value of the land included in the second project can have the advantages of the increased market as a result of the first improvement. This is not to justify a position which maintains that where a condemning authority designates an area and begins condemning parcels of land in that prescribed area that the last parcel to be condemned can benefit from the increased value as a result of the prior parcels having already been condemned.

The elements included in a determination of what is fair market value are many and varied as the cases illustrate, but to allow in evidence as one of those elements an increase in land values that may result between the time of the announcement and the actual taking is to put an unfair burden on the condemnor and the public taxpayer. Market value should mean the fair value of the land as between a seller desiring to sell and a purchaser desiring to buy and not, as was held in the case of *Railroad Co. v. Fisher*:[29]

> what could be obtained for it under peculiar circumstances, when a greater than its fair price could be obtained; not its speculative value; not a value obtained from the necessities of another.

The Georgia position on this question can work both ways for just as the *Hard*[30] case allows evidence of an increase in value, the next case may demand that evidence showing a decrease be allowed. To allow such evidence in either case results only to confuse the issue of just and adequate compensation. The logic of the majority viewpoint appears to eliminate such confusion and dispel unfairness. This writer submits that the Legislature should place our state with the majority.

29. 49 Kan. 17, 30 p. 111 (1892).
30. *Supra* n. 9.