

## PROPERTY—CONDEMNATION—IMPROVEMENTS MADE WITH PRIOR KNOWLEDGE

In *State Highway Department v. Owens*<sup>1</sup> counsel for the State Highway Department twice attempted to show in his cross examination that the defendant had knowledge of the intended condemnation before he began construction of apartments on his property. Defendant's counsel objected to the question as "being irrelevant and immaterial for the taking and damage would apply even if it [the property] were purchased the day before condemnation."<sup>2</sup> Defendant's objection was sustained and error enumerated on appeal. The court of appeals found no error in the refusal of the trial court to permit cross examination attempting to show prior knowledge of the condemnation on the part of the defendant. The right to cross examination, the court pointed out, pertains only to those matters which are relevant to the controversy before the court.<sup>3</sup> Here the question before the court was the value of defendant's property at the time of taking. Therefore, any discussion of circumstances which occurred prior to the condemnation was, to this court at least, immaterial.

It is not difficult to conceive the motive of the Highway Department in seeking to establish some prior knowledge of the condemnation. If it could have been established that defendant sought to enhance the value of his property for the sole purpose of receiving a greater compensation upon its taking, the court would not have been without authority in denying defendant compensation for those additions which were placed on the land solely to enhance his damages. The court in *Owens*, however, dismissed as immaterial these inquiries concerning the landowners knowledge of the condemnation at the time he made the improvements on his land. The only relevant issue to the court was the value of the condemned land at the time of taking — not the use the property owner made of his land while legal title remained vested in him.

The view urged by the Highway Department in *Owens* and the contrary position taken by the Georgia court point up the two views taken by courts seeking to determine the compensability of improvements made on the land by an owner who had prior knowledge of a condemnation.

One line of decisions sees the landowners right to use and enjoy his land as a strict legal right and, consequently will not consider the use

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1. 120 Ga. App. 647, 171 S.E.2d 770 (1969), cert. denied.

2. *Id.* at 648, 171 S.E.2d at 771.

3. GA. CODE ANN. §§ 38-1704, 1705 (Rev. 1954).

made of the land prior to its actual taking. Other courts will look prior to the actual taking in order to determine if the improvements for which the landowner seeks compensation were made in good faith.

Although the courts differ on whether the owner should be held to a good faith use of his property prior to its actual taking, both recognize that any duty on the property owner to refrain from using his land (at least in good faith) prior to its actual taking would amount to an impediment of his constitutionally guaranteed right to use and enjoy his land.<sup>4</sup> Accordingly, statutes which forbade compensation to property owners who built on their land after a map, which indicated that there was to be an appropriation, was filed, have been held unconstitutional by those courts which impose the good faith limitation,<sup>5</sup> as well as those which have adopted the view that this right of the property owner should in no way be impeded prior to the actual taking.<sup>6</sup>

Neither line of decisions then disputes the right of a landowner to use and enjoy his land prior to its actual taking. The area of contention lies between that group of decisions which view the owner's right as absolute and those which qualify the right by requiring that improvements made with knowledge of a condemnation be made in good faith.

#### THE GOOD FAITH QUALIFICATION — A LIMIT TO OWNER'S FREE USE OF HIS PROPERTY

There is no doubt but what the good faith of the owner is material and should be considered in determining whether his actions were motivated by his desire to make the best use of his property and not to enhance his damages.<sup>7</sup>

Thus some courts limit the owners recovery for improvements made with prior knowledge of condemnation to those which were made in good faith. If it is found that the property owner acted in bad faith in improving his property, he will be denied compensation for those improvements made in bad faith.<sup>8</sup>

Whether the property owner has, in fact, acted in bad faith seems to

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4. U. S. CONST. amend. XIV, § 1.

5. *Forster v. Scott*, 136 N.Y. 577, 32 N.E. 976 (1893).

6. *In re Briggs Ave.*, 118 App. Div. 224, 102 N.Y.S. 1102 (1907).

7. *Arkansas State Highway Comm'n v. Dean*, 244 Ark. 905, \_\_\_\_, 425 S.W.2d 306, 310 (1968) (concurring opinion).

8. "Of course if the owner's sole purpose is the enhancement of his damages upon a subsequent condemnation, he should not recover for such improvements." 27 AM. JUR. 2d *Eminent Domain* § 294 (1966).

hinge on whether the improvements made by him were in the actual, normal and legitimate use of his property.<sup>9</sup> An improvement is considered to be in the actual, normal, and legitimate use of the property if it was made for any purposes other than merely to enhance the damages to be received upon condemnation.<sup>10</sup> Consequently, what is required for a showing of bad faith and, therefore, a denial of compensation for those improvements made with prior knowledge of the taking, is that the landowner did not act toward his property in an actual, normal and legitimate manner; but instead, acted with the sole purpose of enhancing his compensation.<sup>11</sup>

To term this "limitation" which the courts have placed on the landowner as "mild" would be an understatement. Broader restrictions placed on the property owner, however, would come dangerously close to infringing on his constitutionally protected right to freely use and enjoy his land.<sup>12</sup>

The narrow scope of the limitations imposed by the courts is dictated by the realities of condemnation proceedings. Theoretically the taking of land and the payment of just compensation should be done in the same day. Practically, of course, this is not the case. The interval between the discussion stage and the time of the actual taking is often lengthy. The possibility that the taking will never occur also exists. The property owner, even though he is said to have notice of a proposed condemnation, certainly does not know *when* and actually does not know *if* the proposed condemnation will in fact occur. Because of this uncertainty the landowner is subjected to only a good faith requirement in the use of his land prior to condemnation.<sup>13</sup> The owner should not be required to wait in breathless anticipation of a proposed condemnation; he should, on the other hand, be free to use his property as he sees fit, in the absence of a demonstrable showing of bad faith.<sup>14</sup>

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9. *Frontier Town Properties, Inc. v. State*, 58 Misc. 2d 388, 296 N.Y.S.2d 90 (1968); *In re West 1720 St. in City of New York*, 167 App. Div. 807, 153 N.Y.S. 128 (1915).

10. 167 App. Div. 807, 153 N.Y.S. 128 (1915).

11. When, however, a building is erected or moved upon land which the owner knows is to be taken by eminent domain, and is placed upon such land in bad faith, with the sole purpose of enhancing the damages and not in the natural, ordinary and legitimate use of such property . . . the building remains personal property and should not be considered in determining the value of the real estate. NICHOLS' THE LAW OF EMINENT DOMAIN § 5.81 (1) (J. Sackman, 3d rev. ed. 1962).

12. U.S. CONST. Amend. XIV, § 1.

13. As long as the owner cannot compel another party to act or complete a pending proceeding it would seem to be inequitable to restrain him from enjoying the ordinary use and control of his property. See *Forster v. Scott*, 136 N.Y. 577, 32 N.E. 976 (1893).

14. 58 Misc. 2d 388, 296 N.Y.S. 2d 90 (1968).

The "good faith" qualification administered by the courts is obviously not a demanding one. The rights of the landowner and the burden placed on him by the uncertainties of the condemnation process dictate the wide boundaries between which the property owner may act in satisfying the standard of good faith.

#### STRICT VIEW—NO LIMIT ON THE PROPERTY OWNERS USE OF HIS LAND

Some courts have refused to hold the property owners to a good faith standard in regard to improvements made with knowledge of future condemnation proceedings. In *In Re Baychester Avenue*<sup>15</sup> one who erected a house after the commissioner of assessment was appointed — but before title had actually been acquired, was allowed compensation despite the fact that the house was placed on the land solely to enhance the compensation. *In Re Briggs*<sup>16</sup> brought a similar pronouncement. The court there held that the landowner was exercising his strict legal right in using his land. In exercising this strict legal right the question of whether the landowner had exhibited good or bad faith in improving his land was immaterial.

Pronouncements such as those in *Baychester* and *Briggs*, which completely and explicitly free the landowner of any good faith requirement, are rare. Often the court, as in *Owens*, will simply refuse to reach the point where a ruling on the good faith of the owner becomes a necessity. *City of Dallas v. Holcomb*<sup>17</sup> presented a situation similar to that in the *Owens* case. In *Dallas* counsel for the people sought to cross examine Holcomb in order to establish that he had knowledge of the location of a pipeline strip to be taken, and that he constructed his dam and lake accordingly so that he might increase his damages. The court held that it was not material to show whether Holcomb did or did not know of the intended condemnation when he began construction of the dam.

Whether the court explicitly frees the owner of any good faith obligation or dismisses as immaterial probes into circumstances prior to the actual taking — the result is the same. In either case the landowner is free to act as he pleases, unhindered by any requirements of good faith.

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15. 120 App. Div. 393, 105 N.Y.S. 241 (1907). See also *Briggs v. Comm'rs of Labette County*, 39 Kan. 90, 17 P. 331 (1888).

16. 18 App. Div. 224, 102 N.Y.S. 1102 (1907).

17. 381 S.W.2d 347 (Tex. Civ. App. — Dallas 1964), writ of error denied (not reversible error), — Tex. — 383 S.W.2d 585 (1964).

When property is taken for public use the aim of the courts is to compensate the owner for the loss he has suffered as a result of the condemnation. Compensation implies a *quid pro quo* — neither the government nor the landowner is to profit. In seeking a fair and just result it does not seem at all unreasonable to limit the landowner to good faith improvements of his property. This is especially true when one considers that the owner has violated the standard of good faith only when he has acted solely to enhance his damages. It would seem, therefore, that an examination of the motives of a landowner in improving his property should be allowed in order to insure a fair compensation.

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