LEGAL

Remedies In Inverse Condemnation -- The Saga Continues

By GIDEON KANNER

This seems like a good time to recall the story about a girl who was asked to write a book review by her teacher. She chose a book about snails, and after reading it, produced a book report that began with the words: "This book tells me more about snails than I care to know." In like vein, it may be that some of the readers are by now concluding that there must be other worthwhile legal topics out there than the question of what is the proper remedy in cases of alleged takings of private property by regulation which the landowner claims to deprive him of reasonable use of his property. However, the topic is a most important one, and the law is in one of those rare stages where appellate court opinions are veritably bursting on the scene, and so, it may be a good idea to keep up with them.

This month we have word from two jurisdictions: New York and North Dakota. In *Eck v. City of Bismarck* (N.D.) 283 N.W. 2d 193, a landowner brought an action in inverse condemnation, seeking damages for the City's refusal to rezone her land from agricultural to residential. After the trial court dismissed the action, the North Dakota Supreme Court, affirmed but remanded the case back to the trial court to allow the owner to refile an action seeking invalidation of the existing zoning. In so doing, the court took a look at what other jurisdictions have done by way of remedies for an uncompensated taking, but even as it denied the owner the right to seek monetary damages on these facts, it expressly refused to follow the rule adopted by California in *Agins v. City of Tiburon* (Cal.) 153 Cal. Rptr. 224. That rule denied the right to recover damages in all regulatory takings, relegating the owner to invalidation of the regulation as his sole remedy.

The North Dakota court reaffirmed the traditional right to seek inverse condemnation damages in cases involving physical damage, but refused to draw the line there. The court pointed out that there are situations in which ostensible regulations may be used to acquire, for all intents and purposes, an easement in the ostensibly regulated land. In such cases, felt the court, the right to damages should be preserved. However, since in this case, the owner had no way of knowing that the Court would establish such a first-impression rule, she was permitted to pursue her lawsuit, albeit for a nonmonetary remedy.

It is another story in New York whose high court has for some time been committed to the position that invalidation is well-nigh the only remedy of a landowner aggrieved by harsh regulations, the exception apparently being where the ostensible regulation is actually a device to facilitate a planned condemnation. The New York Court of Appeals, unlike some other courts which pay lip service to the remedy of invalidation but do not provide it, has been quite intellectually honest about its position, and has been invalidating such regulations regularly.

In the process of so doing, the court has grappled with the problems likely to arise in the process of such judicial invalidation proceedings. The case of *Spears v. Berle* (N.Y.) ____N.E.2d____(case No. 373, decided October 18, 1979), is a significant new development in this area. The facts were familiar; the owners had a bog which came under the jurisdiction of the State Commissioner of Environmental Conservation, as a wetland. The owner sought a permit to extract humus and aggregate. Since these activities would destroy the bog, the permit was denied. The owners, who took the position that unless the permit were granted their land would be worthless, sued. The lower court held that the owner's position had merit, and ordered that either the permit be issued or the property be condemned. The Court of Appeals reversed and remanded the case to the trial court, but in the process rendered a most significant new decision that should go a long way toward simplifying the often mind-boggling evidentiary problems in such litigation.

Here is the problem: the owner applies for a permit, some sort of administrative hearing is held, and the permit is denied. Normally, the owner has no opportunity in such a proceeding to put on appraisal testimony as to the regulatory impact on the value of his property, should a permit be denied. In this case, all there was in the record was the conclusion of one of the owners of the worthlessness of the subject property without the permit. This, held the court, was not enough to make out a case of taking. But what is the right way of doing it?

The court responded to that question by pointing out that while the owner has the burden of proving a taking, it is unfair to ask him to do so without knowing what uses of his land *will* be permitted. And so, ruled the court, the owner should "be afforded a reasonable opportunity to obtain notice of the uses, if any, for which the Commissioner would issue a permit."The specific procedure for so doing was left flexible, but no doubt

was left that the owner is entitled to address the economic consequences of a specific use scheme that would be permitted, and will not in future New York proceedings of this kind have to play a game of intellectual blind man's bluff, trying to make a showing of worthlessness of his land without knowing what uses of it will be permitted.

About the Author

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Washington News

By DAVID R. LEVIN

Legislative and administrative activities move along in Washington, D.C. The period since our last report is no exception.

HIGHWAYS - H.R. 4249 has been approved. It contains mostly housekeeping amendments to the Surface Transportation Assistance Act of 1978. In Section 2(c) (6), payback will be expected prospectively for future projects, but not retrospectively, in the following terms:

> (6) Notwithstanding any other provision of law—
>
> "(A) in the case of any withdrawal of approval on or after November 6, 1978, of a route or portion thereof on the Interstate System, a State, subject to the approval of the Secretary, shall not be required to refund to the Highway Trust Fund any sums paid to the State for intangible costs;
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> "(B) in the case of any withdrawal of approval on or after November 6, 1978, of any route or portion thereof on the Interstate System under this section, a State shall not be required to refund to the Highway Trust Fund the costs of construction items, materials, or rights-of-way of the withdrawn route or portion thereof if such items, materials, and rights-of-way were acquired before November 6, 1978, if by the date of withdrawal of approval the Secretary has not approved the environmental impact statement required by the National Environmental Policy Act of 1969, and if such construction items, materials, or rights-of-way will be or have been applied (i) to a transportation project permissible under this title, (ii) to a public conservation or public recreation purpose, or (iii) to any other public purpose determined by the Secretary to be in the public interest on condition that the State gives assurances satisfactory to the Secretary that such construction items, materials, or rights-of-way have been or will be so applied by the State, or any political subdivision thereof, to a project under clause (i), (ii), or (iii) within 10 years from the date of withdrawal of approval;

The interested reader is urged to obtain a copy of the law in full.

There has been further legislative development on S. 1108, the Sasser Bill, which would amend the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. Three days of hearings have been held and no further hearings are contemplated. Many important amendments have been proposed, which testifying witnesses have addressed. These include increasing the dollar benefits, redefining a displaced person to broaden considerably the eligibility for benefits, requiring additional appraisals, requiring public utilities and others to provide benefits, eliminating the 180-day qualifying period for home-owners, and many other important elements.

The Comptroller General of the United States indicated that the Federal Government has not completely met its goal of providing uniform treatment to people displaced from their homes and business, and that one of the underlying reasons for this is the President's lack of authority to promulgate a uniform set of regulations. The U.S. Department of Transportation testified that as a matter of equity, it is desirable to expand the definition of a displaced person to include individuals forced to move by Federally assisted, privately sponsored projects, but to do so in a more restrictive formulation than to redefine a displaced person; the Department also endorsed adjusted relocation assistance benefits; and it also recommended that the Act be revised to provide additional assistance to non-residential displacees.

The American Association of State Highway and Transportation Officials provided a statement in connection with the hearings that the bill has some positive features, such as increased benefits, but also has some negative areas, such as extending