Legal

'Scope Of The Project' Rule Gets Time Limits

By Gideon Kanner

It has been the law at least since *U.S. v. Miller* (1943) 317 U.S. 369, that any increase in value experienced by land that lies within the boundaries of a proposed government project, that is caused by prospects of that project's coming, may not be considered as part of the property's market value when the condemnation eventually comes; at that time the property is to be valued as if the knowledge of the project's coming had not existed. This is known as the "scope of the project" rule. In other words, as to land lying within the scope of the project, any increase or decrease in value caused by the project's imminence is not included in awarding "just compensation." The theory of this rule is that the government should not be required to pay that increment of market value that was created by its own needs and plans. Conversely, the landowner should not have the fair market value of his land diminished by the fact that the market's response to the prospects of the project was negative. But this rule can give rise to problems in application, as illustrated by *U.S. v. 320 Acres, etc.* (1979, 5th Cir.) 605 F. 2d 762.

The issue arose in the condemnation of Florida land for the expansion of the Everglades National Park. The condemnor routinely invoked the scope of the project rule and asked the trial court to exclude all increments of value that accrued after the announcement of the project (i.e., of the expansion), and to that end to exclude evidence of all comparable sales that took place after such announcement. The problem, however, was that the project was announced way back in 1958, whereas the condemnation took place in 1976, almost 20 years later. The trial court ruled in favor of the government. The owners appealed, and the Court of Appeals reversed, giving us in the process what is undoubtedly the most thorough and comprehensive analysis of the scope of the project rule. The trial court's ruling was found to be erroneous.

The appellate court began its analysis by noting that the fundamental principle of "just compensation" law is that the results must be just, fair and equitable. Thus, any application of the scope of the project rule could not be mechanical. To begin with, while the scope of the project rule precludes recovery by the owner of the project-caused increment of value, there is nothing in the rule that precludes the owner from recovering an award that reflects increases in the market due to non-project influences (such as an increase in demand for land of the type being condemned, inflation, etc.). Therefore, any ruling "freezing" values as of the date of project announcement (in this case 1958) without an opportunity to show that the market has advanced in part for reasons not caused by the project, would deprive the owner of a part of his just compensation. Beyond that, noted the court, it would be unfair to allow the government to delay for as long as it had in this case, and then try to acquire land in the inflationary 1970s at 1950s prices. Finally, one other problem had to be dealt with; the trial court not only excluded any post-1958 increment in market value, but also it barred the introduction of any post-1958 comparable sales.

After an elaborate analysis of pertinent case law, the appellate court concluded that the scope of the project rule was erroneously applied at trial. Although the project was announced in 1958, Congress did not then appropriate any money for acquisition, and ". . . merely authorized a niggardly $24/acre for purchase of 81,000 acres located throughout the Everglades . . .". There was no acquisition for another seven to eight years, at which time Congress appropriated ". . . even a paltry sum for the land acquisition program . . .". In the meantime, a private market continued to thrive in the area for years. Concluded the court: "Individually and together, these three factors—the sheer length of time between the 1958 Act and the takings, the lack of any firm commitment to a land acquisition program in 1958, and the Governmental assurances that the landowners could use and sell their properties freely—compel the conclusion that application of the [scope of the project] rule to exclude any and all value attributable to the Northwest Extension from 1958 to the date of taking was erroneous."

For similar reasons, the court ruled that exclusion of all post-1958 sales in the project area was error. While some such sales may have been artificially inflated by project influences, that does not mean that they are useless to appraisers; that means primarily that any such project influence on the comparables goes to their weight rather than admissibility. Said the court: ". . . where an evidentiary exclusion would eliminate the 'most comparable' sales available, the better course would be to admit the possibly tainted sales with appropriate instructions, permit the parties to present testimony pro and con regarding whether the sales are tainted and how much the taint distorts the true market value, and then instruct the fact-finder as to what elements of value must be included or excluded from the compensation award." In other words, the court differentiated between substantive exclusion (of project-caused value) and evidentiary exclusion of comparables that may be project influenced, but nonetheless retained probative evidentiary value. And so, the court's final conclusion was that the correct date as of which the scope of the project rule is to be applied ". . . is largely a function of reasonable expectations. It is the date as of which the landowners or prospective purchasers no longer could reasonably anticipate being able to devote these properties to their Highest and Best Use in the context of the surrounding governmental project, without serious apprehension that the properties would soon be condemned. In other words, it is the date as of which the prospect of imminent condemnation becomes sufficiently definite that it would be a major factor in the decision of any reasonable person to buy or develop the property."

Gideon Kanner is a Professor of Law at Loyola Law School in Los Angeles. He is also the publisher of "Just Compensation," a monthly report on eminent domain and inverse condemnation.