HOW COMPREHENSIVE IS A "COMPREHENSIVE SCHEME OF IMPROVEMENT?"

In *Urban Renewal Agency v. Spines*[1] the Supreme Court of Kansas was asked whether a condemnee is entitled to the enhanced value accruing to his property as a result of a private development endorsed by an urban renewal agency but not part of a renewal project. This question arose after the Urban Renewal Agency of Wichita[2] designated a downtown renewal project, the boundaries of which encompassed facing parcels of land, one owned by defendant Spines. The second parcel once belonged to a railroad, but after the Agency designated the project boundaries, a third party, Garvey, purchased the land and undertook construction of a $10 million office building.[3] The Garvey building proceeded without formal approval by the Agency,[4] but there was an informal understanding that the Agency was agreeable to the construction of the building within the project area.[5] More important, the Garvey building was financed solely from private sources.[6] When the Agency ultimately condemned the Spines property,[7] the owners claimed that the improvement to the Garvey land had enhanced the value of their property, but the Agency refused to consider the enhancement.[8]

When the Agency appealed the trial court's determination that the Garvey improvement should be considered in appraising the Spines property, the supreme court affirmed the decision below and rejected the Agency's contention with this statement:

> Reduced to its simplest form, the appellant contends land values are frozen within the project area designated by the Urban

1. 202 Kan. 262, 447 P.2d 829 (1968) [hereinafter cited as *Spines*].
2. Hereinafter referred to as "the Agency."
3. Letter from Thomas C. Triplett, attorney for Appellee, to Dennis L. Wittman, Oct. 23, 1969.
4. 202 Kan. at 263, 447 P.2d at 830.
5. The urban renewal project called for construction of a library-civic center complex. *Supra* note 3.
6. 202 Kan. at 263, 447 P.2d at 830.
7. The Garvey property was never condemned or taken, though the Agency had authority to do so. *Id.*
8. The difference in the two values amounted to $8,000—$70,000 valuation without considering the Garvey office building; $78,000 considering the building. *Id.*

> Renewal Agency once the project area is designated and defined. This we cannot accept. The effect of the appellant's position would permit an Urban Renewal Agency to freeze the value of property to be condemned, perhaps for years, by merely drawing the preliminary boundaries of a project to include all adjacent property which might be developed by private enterprise, without any actual intention or plan to devote it to public use.[9]

In essence, the court adopted the conclusion urged by the landowners[10] and rejected the Agency's warning that "[t]o hold that an improvement within the same designated project area begun because of the project and in line with the plan of the project can be used in valuing other lands and improvements in the project would have far-reaching effects."[11]

On its face, the *Spines* decision reaffirms three principles[12] pertaining to the just compensation[13] of landowners in a condemnation proceeding under eminent domain. Briefly these principles are: (1) the landowner has a constitutional right to just compensation;[14] (2) the determination of compensation is a valuation process,[15] and the most practical method of making the valuation determination is to ascertain what courts[16] have come to call, somewhat redundantly,[17]

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9. *Id.* at 265, 447 P.2d at 832.

10. Brief for Appellee at 5, Urban Renewal Agency v. Spines, 202 Kan. 262, 447 P.2d 829 (1968).

11. Brief for Appellant at 5.

12. 4 NICHOLS' THE LAW OF EMINENT DOMAIN § 12.1 (J. Sackman 3d ed. 1964) [hereinafter cited as NICHOLS'].

13. The term "just compensation" is fraught with pitfalls. When courts use it, they usually mean the market value of property acquired. A. JAHR, EMINENT DOMAIN VALUATION AND PROCEDURE § 35 (1957). "To judges and text writers the term connotes a payment in money for the value of the property which the owner lost because of the taking by condemnation." *Id.* One court's definition of the term is: "[V]aluing the property in such a way as not to diminish or depreciate its value because of steps taken by the public authority in carrying out its plan." City of Cincinnati v. Mandel, 9 Ohio Misc. 235, 224 N.E.2d 179 (C.P. Hamilton County 1966).

14. United States v. Miller, 317 U.S. 369 (1943). The definition of just compensation used in *Miller* was: "[T]he full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." *Id.* at 373.

15. 4 NICHOLS' § 12.1.

16. "[T]he ultimate power to determine the question of valuation lies with the judiciary." *Id.* § 12.1[3].

17. United States v. Miller, 317 U.S. 369, 374 (1943).

"fair market value;"[18] and (3) the valuation process is to occur at the time of taking.[19]

Essential to the Agency's case was a claim that the facts in *Spines* called for application of the rule established in *Miller v. United States,*[20] qualifying the traditional principle of valuing property at the time of taking. As set forth by the *Spines* court, the *Miller* rule states that:

> [T]he condemning authority is not obligated to pay for an enhancement in the fair market value of the property which occurs as a result of the public improvement made before the date of taking. That is, *the landowner is not entitled to the additional value resulting as part of the comprehensive scheme of improvement, which requires the taking of his and other property.*[21]

In holding that the *Miller* rule was not applicable,[22] the court rejected the Agency's contention that the enhancement in the value of Spines's land could be considered to have resulted from the "comprehensive scheme of improvement."[23] The Agency had based its contention on the fact that the original plan called for public and private development and that the Garvey building was stimulated by the project and was in conformity to it.

As both parties suggested in *Spines,* there are few cases[24] with a

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18. Fair market value is defined most frequently as the "amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it." 4 NICHOLS' § 12.2[1].

19. *Id.* § 12.23. The time of taking is explained as follows: "The value of real estate is by no means constant, and before compensation can be intelligently assessed for the taking of land by eminent domain, a point of time must be fixed as of which the property is to be valued; and it is the value at that time which the owner is entitled to receive, even if the value of the land rises or falls before the money is actually paid to him . . . .

"All jurisdictions are agreed upon the proposition that the property should be evaluated as of the time of taking, but there is great diversity of opinion as to just when that point of time occurs." *Id.*

20. United States v. Miller, 317 U.S. 369 (1943).

21. 202 Kan. at 264, 447 P.2d at 831 (emphasis added). For the most concise statement of the *Miller* rule, see 4 NICHOLS' § 12.3151[1]. The rule is essentially an exception to the notion that a property owner's just compensation is fair market value at the time of the taking. For examples of how the rule works, see United States v. Miller, 317 U.S. 369 (1943), and Harris v. Commissioners, 151 Kan. 946, 101 P.2d 898 (1940).

22. 202 Kan. at 265, 447 P.2d at 831.

23. Brief for Appellant at 2-6.

24. *See generally* Haley v. State, 406 S.W.2d 477 (Tex. 1966), cited in *Spines* at 265, 447 P.2d at 832.

similar fact pattern. One of the few is *Steck v. City of Wichita*,[25] with which the *Spines* decision is consistent. *Steck* was a condemnation proceeding under eminent domain, in which the city sought the condemnee's land for flood control use. Between the time the project was conceived and the date of taking, subdivisions developed near the condemnee's property. The *Steck* court held that the landowner should receive damages based upon a valuation of his property for subdivision uses, rather than its existing agricultural use.[26]

The *Spines* court's treatment of *Steck* is noteworthy because it mentions the latter only for its affirmation of the *Miller* rule.[27] Yet, in neither *Steck* nor *Spines* did the court find that the landowner's enhanced value resulted from the public project, a conclusion that would have meant invocation of the rule. Instead, the public agency in each case paid the enhanced value stemming from the private projects.

Perhaps the similarity in the cases lulled the court in *Spines* into an unthinking application of the traditional approach without careful consideration of the "comprehensive scheme of improvement" language of the *Miller* rule.[28] Because of the relationship of the public to the private project in each case, the two decisions are distinguishable. In *Steck*, the subdivisions were private developments on land at a distance from the flood control project, though close enough to influence the value of the condemnee's land.[29] In *Spines*, the private development sat within the designated public project's very boundaries.[30] Of course, the public flood control project in *Steck* might have encouraged subdivision development, since the reduction of the flood threat and attendant problems would have made the land more appealing to housing developers. Although the relationship between the public and private projects in *Steck* might have been remote, in *Spines* it was much closer. For instance, the private developers in *Spines* constructed the Garvey building with the tacit approval of the Agency. Furthermore, although the Garvey land was bought directly from the previous owner instead of the Agency, everyone concerned viewed the developers as at least within the "spirit

25. 179 Kan. 305, 295 P.2d 1068 (1956) [hereinafter referred to as *Steck*].
26. *Id.* at 305, 295 P.2d at 1070.
27. 202 Kan. at 264, 447 P.2d at 831.
28. *See* note 21 *supra* and accompanying text.
29. 179 Kan. at 307, 295 P.2d at 1071.
30. 202 Kan. at 263, 447 P.2d at 830.

of the project."[31] Indeed, the renewal plan fully contemplated and encouraged private projects like the Garvey building.[32] This fact leads to the inference that implicit in the project plan was a "comprehensive scheme" for both public and private development within the urban renewal area.

The Kansas urban renewal statute[33] is typical in that it does not contemplate the question raised in *Spines,* and courts have not extended the enhancement doctrine of the *Miller* rule to cover these situations. Yet almost all urban renewal projects are a mixture of public and private activity. Separating the two for valuation purposes is difficult. Generally, courts wish to avoid overcompensation where land increases in value because the comprehensive scheme of improvement requires the taking of property. Frequently, however, property values decline within the project's boundaries when urban renewal plans are announced.[34]

To deal with this loss in value, a line of cases has developed in which courts "roll back" the date of valuation. They avoid penalizing the condemnee for depreciation in value[35] attributable to the renewal agency's activities. To do this, the courts have held that fair market value in these instances is either (1) the amount of money the property would bring in the market "just before it generally was known

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31. *Supra* note 3.

32. *Id.*

33. The relevant portion is KAN. GEN. STAT. ANN. § 17-4744 (1964):
> A municipality, to the greatest extent it determines to be feasible in carrying out the provisions of this act, shall afford maximum opportunity, consistent with the sound needs of the municipality as a whole, to the rehabilitation or redevelopment of the urban renewal area by private enterprise . . . .

34. *See, e.g.,* City of Cleveland v. Carcione, 118 Ohio App. 525, 190 N.E.2d 52 (Ct. App. Cuyahoga County 1963). Tenants on welfare in buildings to be condemned often must vacate well in advance of the actual demolition of buildings. Other tenants also are likely to leave. Vacant buildings soon become the targets of vandals and scavengers who rip out plumbing and anything else that will bring a price. By the time the urban renewal agency finally begins formal acquisition, the area resembles a ghost town, dotted by empty shells of structures worth only a small percentage of their value at the time immediately before the urban renewal project was announced. *Id.*

35. *Compare* City of Baltimore v. United Five & Ten Cent Stores, Inc., 250 Md. 361, 243 A.2d 521 (1968) *with* Urban Renewal Agency v. Monsky, 436 S.W.2d 77 (Ky. 1968) *and* City of Cleveland v. Carcione, 118 Ohio App. 525, 190 N.E.2d 52 (Ct. App. Cuyahoga County 1963).

that the project was to be performed;"[36] or (2) the value "immediately before the city took active steps to carry out the work of the project which to any extent depreciated the value of the property."[37]

If the property owner is to be given consideration when values diminish, the fact that public knowledge of a project causes an enhancement in value should not force the condemnor to pay compensation based upon an inflated market valuation.[38] After all, the purpose of the market value standard for compensation is to ensure that land valuation will be made as fairly and objectively as possible for both condemnor and condemnee.[39]

In eminent domain proceedings to acquire land for urban renewal, the date on which the project plans are announced should be taken as controlling for valuation purposes. If so, any increase or decrease in value would be attributable to the project, and the more reasonable time of valuation would not be the "taking" date but the date immediately prior to the announcement of the project.

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36. Urban Renewal Agency v. Monsky, 436 S.W.2d 77 (Ky. 1968). The time at issue in *Monsky* was just before the project plans were made public. *Id.* at 78. Furthermore, the court said the rationale was not only to prevent penalizing the landowner, but also to *prevent the condemnor from being required to pay for enhancement in value attributable to the project proposal. Id.*

37. City of Cleveland v. Carcione, 118 Ohio App. 525, 190 N.E.2d 52 (Ct. App. Cuyahoga County 1963). Here the trial court ruled that the proper standard was the fair market value at the time of trial. The trial was in 1963, six years after the project was undertaken and tenants on welfare were ordered to begin leaving condemnee's property. *Id.* at 527, 190 N.E.2d at 54. One court reached the same result by interpreting the state's statutory use of the term "fair market value" as:

> The . . . value of property . . . as of the valuation date . . . plus the amount, if any, by which such price reflects a diminution in value occurring between the effective date of the legislative authority for the acquisition of such property and the date of actual taking if the trier of facts shall find that such diminution in value was proximately caused by the public project . . . or announcements of . . . its public officials concerning such public projects.

City of Baltimore v. United Five & Ten Cent Stores, Inc., 250 Md. 361, 243 A.2d 521 (1968). The court allowed the jury to consider diminution over a six-year period from the date of the ordinance designating the project area to the date of the ordinance under which condemnee's property was acquired. *Id.*

38. *See* note 36 *supra* and accompanying text. *But see* 4 NICHOLS' § 12.3151[2], suggesting that although property owners are given consideration when values diminish, many courts do not thereby preclude owners from realizing any enhanced value when that is the case. The decisions are mixed and the suggestion is only that the agency in *Spines* might have pressed the argument along these lines.

39. Annot., 147 A.L.R. 66, 67-68 (1943).

Announcement of a project may drive values down within designated boundaries, but it also may attract private developers like Garvey. Encouraged by the urban renewal agency and capable of moving more quickly, private developers can begin their projects and have them near completion before formal acquisition of land for the public portion of the project is begun. Without the knowledge and assurance that a public project eventually will be undertaken, it is doubtful that private developers would have much interest in neighborhoods like the one in which the Spines property was located.[40]

Emphasizing the significance of the announcement of an urban renewal project in no way suggests that a taking occurs at that point. The suggestion is only that to establish the fair value of property eventually taken for renewal, the more reasonable time at which to view the market for the property is the date the public knows of the project, not the date that proceedings begin for formal acquisition.

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40. On this point the counter-argument in Spines's behalf would be that Garvey could have constructed the office building even without the Agency's civic center project. Such an argument raises issues of comparative valuation, beyond the scope of this comment. For more detail on comparative valuation, see 1969 URBAN L. ANN. 176.