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Highway Condemnations and Related Real Estate Title Problems

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NOTES

HIGHWAY CONDEMNATIONS AND RELATED REAL ESTATE TITLE PROBLEMS

Condemnation proceedings of the Pennsylvania Department of Highways cause real estate lawyers, title searchers and title companies many problems and bring about numerous uncertainties in the law. The problems and uncertainties are the same for the lawyer, the searcher and the company, but the manner of handling them is often different. The lawyer and searcher usually include in their reports a statement concerning possible condemnations if there is cause to believe that there may have been one. If they fail to do so, they cannot be held personally liable for any loss which may occur because of such a condemnation if it in fact has occurred. A title company, on the other hand, generally is forced to make as exhaustive a search as is possible since it will assume the risk of such a condemnation having occurred.

In order to bring out the nature of the proceedings which cause the title problems to which reference will be made, a brief review of the "taking" procedure should be outlined. The statute being referred to here is the State Highway Law,[1] although most of the problems encountered arise also under the Limited Access Highway Law[2] which is being utilized in highway construction with ever-increasing frequency.

The first thing to note in the procedure is that the "taking" or condemnation takes place immediately upon the signing of the appropriation plan by the Governor. This is true even though the property owner does not have notice as of this date and may not, in fact, become aware of the taking until a date considerably later. A lapse of at least three to ten days (and in most cases, much longer) takes place prior to the recording of plans in the office of the recorder of deeds. Therefore, even if a searcher is constantly familiar with all plans in the recorder's office, there is this hiatus during which the land has been condemned, but there is not even the semblance of an attempt to apprise the owner. Service of notice on the owner is supposed to be made soon after the condemnation, but there is often considerable delay. Moreover, in many instances, the Commonwealth's search has been made a year or more prior to condemnation, and therefore the "owner" is not always accurately named.

Coordinated with the taking is the preparation of a plan which is re-

1. PA. STAT. ANN. tit. 36, §§ 670-101—210 (1961).
2. PA. STAT. ANN. tit. 36, §§ 2391.1-.15 (1961).

corded in the office of the recorder of deeds of the county or counties through which the highway will pass. The plan is a very unsatisfactory means of notice, however, since it is not indexed against property owners. The plan merely shows the route of the proposed highway. This means of recording places a very heavy burden on the title searcher. In order to make certain that a particular parcel has not been condemned he must check the entire stack of plans (usually consisting of many volumes) to see if his property has been affected.

Statutory Problem Areas

Highway Department condemnations which may plague title searchers fall generally into three classes. First, the Secretary of Highways has the power to establish the ultimate widths of state highways. Second, the Highway Department has the power to widen existing highways. Third, a highway may be relocated. Certain aspects of each of these functions have different statutory origins and are different in their effect upon title and the rights of property owners.

Ultimate Widths

The power to establish ultimate widths is probably the most unique power, and the one that casts the biggest cloud over the title industry. The statute creating this power[3] provides that the Secretary of Highways, with the approval of the Governor, has the power to establish the ultimate width and lines of a state highway for future construction before or after the highway has been constructed. Thus, the power can be exercised at any time. The ultimate width is limited to the maximum width fixed by law for public roads. The establishment is by a plan approved by the Governor and acknowledged by the Secretary. The plan must show the center line of the highway and the ultimate widths and must be recorded in the office of the recorder of deeds for the proper county. There is no indexing of this plan. It is merely recorded in the recorder's office. There is no requirement, as there is in some other parts of the statute, that the names of the property owners be shown on the plan, although it apparently is the practice of the Highway Department to do this.

The title implications of this statute can be tremendous. The statute provides that the property owner cannot claim damages for the part of the ultimate width which has not been utilized by the Department. However, it also provides that no person is entitled to recover damages for buildings or improvements of any kind placed on or constructed upon or within the ultimate widths and lines of the highway after the plan has been recorded. Thus, if a person owns property which has been subjected to ultimate widths,

3. Pa. Stat. Ann. tit. 36, § 670-206 (1961).

and an improvement has been placed within the lines, a title company would have to pay if it has not excepted the ultimate width from the insurance. Likewise, a searcher's report would be misleading if it did not cover this point. Therefore, if a property fronts on a state highway, a searcher should make a careful effort to ascertain what, if any, ultimate widths have been established and note them carefully in his report, or make a general statement to cover the possibility of such widths existing. The latter is a safe way out for the searcher, but it is often not satisfactory to the recipient of the report, since it is to uncover precisely such things as this that the title search is made.[4]

Apparently, many searchers always assume that the ultimate right of way for a state highway which is involved in a title is 120 feet. This formerly was the maximum width permitted for a state highway by law but it is not the ultimate width of all state highways. It is entirely conceivable that the Highway Department in constructing a highway may condemn only that portion of the land needed for present purposes, without designating ultimate widths. In such cases, it would be misleading to property owners to note in a report that the highway right of way is 120 feet when in fact it is not. Having been told this, the property owner would not place any improvement within the right of way line as designated when in fact he would have a perfect right to do so.

It should also be noted that the Secretary of Highways is given the power, with the approval of the Governor, to change any plan establishing ultimate widths. When this is done the plan must be recorded as was the original, and a notation must be entered on the original that it has been superseded.

Widening of Highways

The power of the State Highway Department to widen existing highways is in no way related to the power to fix ultimate lines. This power is found in the State Highway Law[5] and gives the Secretary the power to change, alter or establish widths, lines, locations or grades of any state highway.

When the Secretary acts under this section, he is required to prepare a plan of the proposed change, which must be duly acknowledged by the Governor and recorded in the office for the recording of deeds in the proper county. The plan must indicate the names of the owners or reputed owners

4. Title insurance companies theoretically could protect themselves against all of the title problems referred to herein by the inclusion of appropriate exceptions in the title insurance contracts. As a practical matter, however, this cannot be done since virtually all lending institutions and most owners receiving policies demand that insurance be written free of such exceptions. Business pressures, therefore, prevent title insurance companies from adopting this approach.

5. PA. STAT. ANN. tit. 36, § 670-210 (1961).

of the land affected by the taking. As previously mentioned, nothing is indexed against these owners nor is the Highway Department always accurate in its designation of the owner. However, one cannot legally complain about these inaccuracies since the statute merely requires the designation of the "reputed owner."

This power of the Secretary involves an actual condemnation and taking, while the exercise of the power to establish ultimate widths merely manifests an intent to condemn in the future. This essential difference has been brought out several times in litigation.

In *Commonwealth v. Pardee Bros.*,[6] a state highway was being widened in some parts and relocated in others. Under the then current legislation, the Sproul Act,[7] as amended, which was the forerunner of our current legislation, the Secretary had the power to widen highways, and also the power to establish ultimate widths. Under this Act, where a highway was being diverted, the Secretary was required to record his plan only with the Department of Highways. In the establishment of ultimate widths, or in the widening of an existing highway, recording was required then, as now, in the proper county. In this case, the Commonwealth filed a bill in equity to restrain the defendant from mining under a portion of the state highway. Defendants said that since the highway was being widened, ultimate widths were being established, and recording therefore was required in the proper county. The court found, however, that the act of the Secretary here was an actual condemnation, and not an establishment of ultimate widths and that therefore no recording was required in the county.

In *In the Matter of Appointment of Viewers*,[8] this distinction was clearly delineated. It was pointed out in this case that the Sproul Act, as amended, provided for two distinct processes: (1) the actual widening of an existing state highway and (2) the establishment of ultimate widths. The former necessitates condemnation of and payment for the land taken for the widening; the latter calls for no present appropriation of land, but operates merely as a plotting of the highway and its ultimate width. The court pointed out that it is consistent to do both of these acts at the same time, that is, widen a highway and establish further ultimate widths. But, if this is done, it must be by two distinctly separate plans and by two recordings.

It is interesting to note that in *Strong Appeal*,[9] the Supreme Court of Pennsylvania held that the provisions of the Sproul Act requiring plans to be filed only with the Department of Highways were unconstitutional

6. 310 Pa. 353, 165 Atl. 396 (1933).
7. Pa. Laws 1929, act 580, § 1, at 1770.
8. 103 Pa. Super. 212, 158 Atl. 296 (1931).
9. 400 Pa. 51, 161 A.2d 912 (1959).

insofar as they were intended to constitute notice to the owner of a taking. This case follows decisions in *Angle v. Commonwealth*[10] and *Pagni v. Commonwealth*.[11] In each of these three cases it was held that recording of a plan in the office of the recorder of deeds of the proper county is constructive notice of the taking to the landowner, but that the filing of such a plan only with the Department of Highways is no notice at all. The courts in the *Pagni* and *Strong* cases concluded that the six-year statute of limitations did not begin to run when the Governor signed the plan, as is provided in the statute governing claims for damages resulting from highway condemnations.[12] Since these courts held that the statute could not begin to run until there was actual notice, it may be possible to argue successfully that even in cases where there is local recording, the statute begins to run only upon such recording. No such decision has been found, and it appears that it is the general practice to regard the signing date as the time when the statute begins to run. Even if the courts should adopt this view, however, it would not aid the title searcher, since the taking would nevertheless be effective upon signing.

Another case which illustrates the distinction between these two areas is *Penn Builders, Inc. v. Blair County*.[13] Here a highway was to be rerouted in order to remove a dangerous curve. The official certificate indicated that 100 feet would be taken, but the same plan indicated that only 33 feet would be improved at that particular time. The argument was made that the 100 feet was only an ultimate width, but this was rejected. The court said that a separate procedure was available to establish ultimate widths. Therefore the court held that there was, at that time, a compensable taking of 100 feet.

Relocation of Highways

The third problem area which has been mentioned is the power of the Secretary of Highways to relocate existing state highways. This power is found in the same section of the statute in which the power to widen is given.[14] It is exercised when the Department deems it necessary to change the route of an existing highway. A most common exercise of this power takes place when the Department improves a highway by taking out dangerous curves. Another example of an exercise of this power would be the by-passing of a town.

After the relocated highway has been opened, the Secretary can abandon

10. 396 Pa. 514, 153 A.2d 912 (1959).
11. 179 Pa. Super. 213, 116 A.2d 294 (1955).
12. PA. STAT. ANN. tit. 12, § 43 (1935).
13. 302 Pa. 300, 158 Atl. 433 (1931).
14. *Supra* note 5.

the old highway as a state highway. If the old highway is not more than two miles long and is deemed by the Secretary to be unnecessary for public use and travel, or burdensome or dangerous, the Secretary may, having due regard for the convenience of access to the new highway by abutting owners, declare such part vacated and it shall no longer be a public road. When the old road is merely abandoned as a state highway, it remains a public road; on the other hand, if it is vacated, public rights are extinguished.

When the Secretary acts under the provisions to relocate, widen or vacate, a copy of the plan, approved by the Governor, must be recorded in the office of the recorder of deeds of the proper county. As noted earlier, the names of the owners or reputed owners of the properties involved must be indicated, but there is no indexing against their names.

Under Section 219 of the State Highway Law,[15] the Secretary, with the Governor's approval, may designate the future location and width of any proposed highway. The Department thus continues to maintain the present highway until the new highway is completed and opened. A plan must accompany this act of the Secretary and must be recorded in the appropriate county. This is similar to the power to establish ultimate widths, in that no damages for subsequent improvements can be obtained nor is there a requirement that the property owners be named.

The provisions in the State Highway Law giving these powers as to ultimate widths and proposed locations are extraordinary in that, although the owner cannot receive damages as of the date of this establishment, his land is "taken," at least to the extent that he can no longer utilize the property for improvement purposes. As far as has been ascertained, this issue has never been raised as a constitutional question in a case involving the State Highway Law.

Problem Situations

Highway condemnations often cause problems for searchers where a condemnation has been started, of which the owner either is not aware or about which he is withholding information. Unless the searcher has a most up-to-date check on the recordings of plans, settlement can be held, money disbursed to seller, and then the next day the highway department crews may start work. The buyer then runs to the searcher. There is nothing to do but sue for fraud, since the law is clear that the owner at the time the Governor affixes his signature is entitled to the damages, while under these facts, the buyer should be equitably entitled to receive the damages since it is he who has lost.

The converse of this situation was illustrated in *Smith v. Common-*

15. Pa. Stat. Ann. tit. 36, § 670-219 (1961).

wealth,[16] where viewers gave damages to a person who had sold prior to the condemnation. The lower court, on appeal, ruled that the jury could decide whether or not the grantor and grantee had agreed that the grantor should receive the damages. The supreme court reversed, reiterating that the owner of record as of the date of condemnation controlled, and that, unless there is an express reservation in the deed, an agreement that the grantor was to receive the damages cannot be shown.

In *Wood v. Ebanitzsky*,[17] the grantor conveyed by a general warranty deed. There had been a condemnation some time prior to the date of the agreement of sale. The grantor received condemnation damages after the date of the conveyance, having been the owner on the condemnation date. The lower courts (common pleas and superior) denied grantee's claim for the money on the theory that on the date of the conveyance the work had been begun and was obvious to the buyer, who then bought with knowledge of the taking. The supreme court, however, reversed and held that the important date was the date of the agreement of sale, on which date the work had not been started. The *Wood* case was followed in *Prechtel v. Miller*[18] where similar facts were involved.

The case of *Koontz v. Commonwealth*[19] presents a most interesting conclusion for one studying condemnation proceedings. In this case there was a normal highway condemnation. The plan showed the right of way to be tangent to plaintiff's property. Plaintiff demanded damages, contending that some of his land had been taken regardless of what the plan showed. The state argued that if his land had been utilized, it was a trespass, and not a taking compensable as a damage sustained in condemnation. The court found that a plan is not the last word; the precise position that the survey lines occupy on the ground is controlling. The jury was given the question, and found that the survey actually showed an encroachment of 4½ inches to 4¾ inches. Therefore, plaintiff was allowed damages. This case is very interesting because it shows that even if you follow the maps carefully, you can still be wrong.

Inaccuracies in original condemnations can cause title headaches in future years when the question of the actual width of an existing highway now to be widened becomes important. In two relatively recent cases, *Hostetter v. Commonwealth*[20] and *Kamerer v. Commonwealth*,[21] the courts were faced with the problem of not being able to ascertain definitely the

16. 351 Pa. 68, 40 A.2d 383 (1945).
17. 369 Pa. 123, 85 A.2d 24 (1951).
18. 5 D.&C.2d 54 (Pa. 1955).
19. 364 Pa. 145, 70 A.2d 308 (1950).
20. 367 Pa. 603, 80 A.2d 719 (1951).
21. 364 Pa. 120, 70 A.2d 305 (1950).

width of the original highway. The issue was important in each case in determining the amount of land that had been taken from the plaintiff by a subsequent condemnation. The court in each case allowed the jury to decide the question. A searcher or a title company could become embroiled in such a controversy if it were assumed that a smaller amount of property than that actually condemned was taken by the original condemnation, because, having done this, the owner would assume he owned more than he in fact did.

Comparison With Public Utility Commission Procedure

At least brief mention of the function of the Public Utility Commission as related to highway condemnations should be made. The PUC takes action, and has exclusive jurisdiction, wherever a state highway intersects the facilities of a public utility. The points at which and the manner in which the crossing may be constructed, altered, relocated or abolished, and the maintenance thereof are all controlled exclusively by the PUC. The Commission may act on its own motion or upon complaint. The PUC may abandon or vacate such highways or portions of highways as, in its opinion, are rendered unnecessary for public use. It also has the power to designate which entity shall perform the work required. In short, as to matters affecting utilities, the PUC is omnipotent.[22]

An important difference between the condemnation powers of the PUC and the Highway Department is that the PUC records the portions of its order dealing with the appropriation, and such order must then be indexed against the names of the record owners of such property. This is precisely what searchers and title companies would like to see required in Highway Department condemnations.

Conclusion

Indeed, many of the title and practical problems which have been mentioned herein would vanish if the Department of Highways were required to index its condemnations against record owners. Another step which would aid and clarify the situation would be a law making the time of the condemnation the recording time. These two steps would eliminate the uncertainty as to condemnations and also would eliminate the time lag which now exists. Complete title searching would be a far more reasonable task, in turn producing much more satisfactory results for the client.

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22. See Pa. Stat. Ann. tit. 66, § 1179 (1959).

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