

NRPA BRIEF URGES "MARKET" VALUE INAPPROPRIATE
FOR DEDICATED PARKLAND

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At the request of the Fairfax County Park Authority (FCPA), the Public Policy Division of the National Recreation and Park Association prepared an *amicus curiae* ("friend of the court") brief in the case of *Fairfax County Park Authority v. Virginia Department of Transportation, (VDOT)* Record No. 930391. This case has been accepted for review by the Supreme Court of Virginia. This case involved the condemnation of a portion of Ellanor C. Lawrence Park by VDOT for a highway project. The facts of the case were as follows:

In 1988, VDOT filed a certificate of condemnation for approximately 11 acres of park property known as the Ellanor C. Lawrence Park. Subsequently the certificate was amended to reduce the taking to 2.6 acres in fee simple, 1.05 acres for a temporary easement, and .36 acres for a drainage easement.

The Fairfax County Park Authority manages the Ellanor C. Lawrence Park subject to the provisions of a trust agreement created in 1970 by David C. Lawrence. This agreement provides that the Park Authority shall be the remainder beneficiary of the Residuary Trust so long as the Park Authority continues to use the property "as a public park dedicated to the memory of Ellanor C. Lawrence"...

On February 28, 1992, in response to VDOT's motion, Fairfax County Circuit Judge Howe Brown issued a letter opinion holding that the measure of compensation was the fair market value of the land taken as restricted by the trust...

On October 6, 1992, a non-jury hearing was held on the issue of valuation. Circuit Court Judge Rosemarie Annunziata followed the measure of damages set forth by Judge Brown's Order and held that the evidence supported a finding that there was a market value for the property taken of \$2,125 an acre and no damage to the remainder. The value of the land unrestricted by the Trust proffered by the Park Authority was \$125,000.00 an acre if used for residential use and not restricted to public park use.

A Final Order was entered on December 18, 1992, awarding \$6,450.00 for the taking.

The Virginia Supreme Court granted NRPA's motion to file an "amicus" brief on behalf of FCPA in this case. If the Virginia Supreme Court, as expected, hears oral arguments in early 1994, a written opinion may be forthcoming sometime in Spring 1994.

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A truncated version of NRPA's brief is presented in the following paragraphs. A full copy of this brief is available through the NRPA Public Policy Division.

QUESTIONS PRESENTED

1. Whether just compensation for private land donated for public park purposes and subsequently taken through condemnation proceedings should be based upon the fair market value or the substitute facilities doctrine.
2. Whether the fair market value in determining just compensation for an eminent domain taking is appropriate where the land taken involves a private dedication of real property to be held in public trust by the Fairfax County Park Authority for the citizens of Fairfax County.
3. Whether the intent of the private donor, as indicated by the terms of a deed of dedication for park purposes, should be strictly construed to preserve the qualitative and quantitative integrity of the public trust by requiring just compensation equal to the cost of functional replacement land.

ARGUMENTS AND AUTHORITY

In reviewing this controversy, NRPA would respectfully request that the Court not limit its consideration to the available body of case law on eminent domain. As indicated by the briefs of the parties, the number of eminent domain cases determining just compensation for condemned public park land is severely limited. Further, many of these cases do not involve a private donation of land dedicated for public park purposes.

Courts have traditionally been deferential to the intent of the private donor as expressed in the deed and will strictly scrutinize governmental attempts to frustrate or defeat the objectives of a private dedication of land for public park purposes. As indicated below, reported cases in support of this judicial approach are not traditional eminent domain cases. Rather, these cases involve attempts to divert dedicated public park land to other uses. The general legal principles illustrated by these cases and the underlying public policy considerations, in the opinion of NRPA, are equally applicable in determining "just compensation" when such park lands are condemned. Specifically, NRPA would request that the Court apply the "substitute facilities" doctrine described below, rather than the fair market value approach adopted by the trial court in this case.

MARKET VALUE NOT EXCLUSIVE STANDARD

The Virginia Department of Transportation (VDOT) characterizes the issue in this case as "[w]hether the land should be valued at fair market value for unrestricted use, or as restricted by deed." This characterization ignores the special nature of the deed involved, i.e. a private donation of land to be held by the Fairfax County Park Authority in public trust for public park purposes. In our opinion, VDOT

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misconstrues this case involving a private gift for public park purposes when it states: "The rule of valuation used in Virginia and other states is relatively simple. The value at the time of the taking is the just compensation to which the owner is entitled under the Constitutional provisions."

There are, however, no fixed rules to determine just compensation in every instance. Rather, the measure of compensation for a particular piece of property will depend on the nature and extent of the right or interest taken.

Generally, the measure of damages for parkland taken under eminent domain is the fair market value of the property. Fair market value is the price which would have been agreed upon in a voluntary sale between a willing seller and willing buyer. Actual value is measured at the time of taking rather than speculative future values.

Market value, however, is not an absolute or exclusive standard of valuation. Every element which can fairly enter into the question of value may be considered in determining the amount of just compensation In such cases, courts have had to resort to various methods to determine just compensation (29a C.J.S. Eminent Domain § 136; 27 Am Jur 2d Eminent Domain)

SUBSTITUTE FACILITIES DOCTRINE

In determining the appropriate method to determine just compensation in this particular instance, the recent federal claims court decision of *Board of County Supervisors of Prince William County, Virginia v. United States*, 27 Fed. Cl. 339 (1992) indicates that a "substitute facilities" method may be more appropriate than "fair market value" in determining Just compensation for "public facilities for which fair market value cannot be determined accurately," particularly private dedications of land for public parks.

In this case, plaintiff sought compensation computed by the fair market value standard for the legislative taking of 16.05 acres of property. Defendant argued that plaintiff was entitled to nominal compensation only. The land at issue had been dedicated to public streets by the developer of a planned subdivision for the area. When the United States condemned the area for expansion of a national battlefield park, the County claimed just compensation should be based upon the fair market value of residential properties in the area. The federal claims court rejected this argument. In so doing, the federal claims court described the general principles governing "Just Compensation" under the Fifth Amendment as follows:

The Fifth Amendment requires that the United States pay "just compensation" whenever it takes private property for public use. Private property may be construed as encompassing the property of state and local governments when it is condemned by the United States. Under thin construction, the same principles of just compensation presumptively apply to both private and public condemnees..

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The guiding principle in determining just compensation is reimbursement to the owner for the value of the property interest taken. The owner is "entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole, but is not entitled to more. The question is .what has the owner lost, not what has the taker gained... The Supreme Court has repeatedly held that just compensation normally is to be measured by the market value of the property at the time of the taking, i.e., what a willing buyer would pay in cash to a willing seller.

As noted by the federal court, "[d]eviation from this measure of just compensation has been required only when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public."

The instances in which market value is too difficult to determine generally involve properties that are seldom, if ever, sold in the open market. Under those circumstances, we cannot predict whether the prices previously paid, assuming there have been prior sales, would be repeated in a sale of the condemned property.

When this is the case, it is said that there is 'no market' for the property in question. This might be the case with respect to public facilities such as roads or sewers... Generally, courts apply the "substitute facilities" standard to determine just compensation for streets, sewers or other public facilities for which fair market value cannot be determined accurately.

The federal court acknowledged, however, "[w]hen no substitute facility is necessary, fair market value is the standard for compensation when it can be determined."

Often only nominal damages are justified where streets, highways and the like need not be replaced. However, the fact that substitute facilities are not required does not in itself compel an award of only nominal compensation.

The fundamental principle is that when street or rights of way are condemned, the public entity 'must be awarded the 'actual money loss which will be occasioned by the condemnation This amount is usually the cost of constructing substitute roads. However, this does not imply that the cost of a substitute road is the only measure of damages when street rights of way are condemned. The substitute facilities doctrine is' not an exception to the fair market value test but merely an alternative means of determining just compensation when a public facility is involved.. It cannot, consistently with the Fifth Amendment, be used to deny an owner compensation when a taking has inflicted loss.

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In this particular instance, the federal claims court found that the "substitute facilities" doctrine did not apply because "the County stipulated that substitute facilities were not required."

"Just compensation" is measured by what the landowner lost by the taking, and, absent a need for substitute facilities, this is the value of lands in question burdened as they were. In the final analysis, the dominant consideration is: 'What compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill?' While the appropriate standard the court uses to determine "just compensation" may differ depending on the facts of the case, the selection of that standard is a question of law to be decided by the trial judge...

In order to determine what plaintiff lost by the taking, the court must first determine, as a matter of law, the legal effect of the dedication of the land conveyed to the County... As a general rule, the terms of a deed of dedication made by a private donor are more strictly construed against a governmental grantee than when the property is acquired by a governmental agency through purchase or condemnation.

Applying these principles to present valuation controversy involving Lawrence Park lead to the opposite conclusion, viz., the "substitute facilities" doctrine is the appropriate method of valuation. Specifically, the public park land taken through condemnation by VDOT necessarily reduces the availability of public open space and creates a need for substitute facilities. More importantly, however, application of the "substitute facilities" doctrine is consistent with the legal effect of the dedication of the private land conveyed in public trust to the Authority for park purposes.

PRIVATE GIFT, PUBLIC TRUST, STRICTLY CONSTRUED

As noted above and illustrated by the following description of relevant case law from other jurisdictions, courts have strictly construed the terms of a deed of dedication made by a private donor. In so doing, courts have traditionally resisted the efforts of governmental entities (such as VDOT in this particular case) to construe the deed in a manner which diminishes the integrity of land held in public trust. Accordingly, cases cited as authority in support of VDOT's position in this case are inappropriate because the land at issue in each of these cases did not involve a deed of dedication made by a private donor of real property to be held in public trust for public park purposes.

PUBLIC IS BENEFICIARY TO BE COMPENSATED

The case of *Borough of Ridgway v. Grant*, 56 Pa. Comnw. 450; 42,5 A.2d 1168 (1981) supports the proposition that a dedication of the land for park purposes establishes a public trust in which the government is trustee and the public is the beneficiary.

There can be no doubt that the Borough has manifested a clear and unequivocal intention' to devote Grant Park to park purposes only. The public, in turn, has used the

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land as a park solely for park purposes for the same number of years. Clearly, there has been an intent to dedicate and an acceptance thereof. [Although the deed conveyed a fee simple title, it also created a charitable trust, the purposes of which could not be changed by the trustee unless such purposes could no longer be carried out...

A municipality can not revoke or destroy, after dedication and acceptance, the right of the public to the exclusive use of the property for the purpose designated...

As a result., the loss sustained by the owner as a measure of "just compensation should not be based upon any economic loss, or lack thereof, sustained by the Authority. On the contrary, an appropriate "just compensation" determination should reflect the loss in available open space resources which will be sustained by the public as beneficiary of the public trust.

COURTS ZEALOUSLY GUARD PARK GIFTS

Further, in *Big Sur Properties v. Mott*, 62 Cal.App.3d 99; 132 Cal. Rptr. 835 (1976, the appeals court acknowledged "where property is acquired through private dedication, the deed is strictly construed."

It is well settled that where a grant deed is for a specified, limited and definite purpose, the subject of the grant cannot be used for another and different purpose. Where a tract of fund is donated to a city with a restriction upon its use - as, for instance, when it is donated or dedicated solely for a park - the city cannot legally divert the use of such property to purposes inconsistent with the terms of the grant...

[Land] which has been dedicated as a public park must be used in conformity with the terms of the dedication, and it is without the power of a municipality to divert or withdraw the land from use for park purposes. Such fund is held upon what is loosely referred to as a 'public trust" and any attempt to divert the use of the property from its dedicated purposes or uses incidental thereto is an ultra vires [i.e. unauthorized] act.

Courts have guarded zealously the restrictive covenants in donations of property for public use. Such an effort on the part of a municipality if successful may be but the opening wedge, and, some future board might claim that under their discretion a corporation yard and rock-pile for the employment of prisoners, and other very useful adjuncts to the administration of the economic affairs of the town, might be located thereupon, until the entire space was fully so occupied...

Further, "where uncertainty exists consideration may be given to the consequences that will flow from a particular interpretation. Clearly, the consequences of the application of section 5003.5, [a state statute authorizing access permits across state park lands] and other similar regulations, to defeat the public trust doctrine would result in a policy

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discouraging such gifts to the state for park purposes. Such an unwise intended result is not to be readily implied where another construction is possible.

Unfortunately, the trial court in this case adopted VDOT's valuation method which would "effectively defeat the public trust doctrine would result in a policy discouraging such gifts to the state for park purposes."

CONCLUSION

In our opinion, VDOT is using the park purposes restriction in the Lawrence deed to the Authority to artificially depress the value of the land taken and effectively frustrate the original intent of the private dedication. Rather than ensure the existence and availability of the donor's land for public park purposes, VDOT would have the court use the very terms of private dedication, the restriction to park purposes, to diminish the size of the tract available for public park purposes. This position is clearly contrary to the strict scrutiny approach courts have traditionally taken in construing governmental attempts to defeat a public trust created by a private donation and dedication to public park purposes.

VDOT's construction of the deed to devalue land held in public trust would undoubtedly have a chilling effect on future donations. Traditionally, the park system of many major cities have acquired magnificent private estates through gifts of land to be held in public trust for park purposes. Generally, these gifts of land have involved a dedication of land restricted to public park purposes similar to that contained in the deed to the Authority for Lawrence Park. If the Court were to adopt VDOT's inappropriate and nonexistent market valuation as "just compensation" for the condemned park land, not only would the integrity of this particular public trust be compromised, but the Court would set a precedent in Virginia in which severely limited public park and open space would become an easy low cost target for condemnation to develop highways.

As mentioned above, the Authority in this instance should be viewed as a trustee for the park land held in public trust. Further, the citizens of Fairfax County and the Commonwealth are the beneficiaries of this public trust who should receive "just compensation" for park land lost through condemnation.

Consistent with the donor's intent, as expressed in the language of the deed, the Authority is fulfilling its responsibility as trustee to resist condemnation ("contest such proceedings in every fashion reasonably possible"). In so doing, the Authority acknowledges its trustee responsibility to preserve the quantitative and qualitative integrity of the public trust by seeking the value of "substitute facilities." In light of the case law described above, NRPA would urge the Court to preserve this public trust by applying the "substitute facilities" doctrine and requiring VDOT to provide sufficient compensation earmarked for the acquisition of functional replacement land for the public park acreage taken.