

COMPENSATION FOR CONDEMNED LAND NOT DEVALUED BY PARK DEDICATION

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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 had prepared an *amicus curiae* ("friend of the court") brief in the case of *Fairfax County Park Authority v. Virginia Department of Transportation*, Record No. 930391. (See January 1994 "NRPA Law Review" column entitled "NRPA Brief Urges 'Market' Value Inappropriate for Dedicated Parkland" for an overview of NRPA's views in this case.)

In its brief, NRPA urged the Virginia supreme court to reconsider a condemnation award which was based upon a non-existent "market" for land dedicated to public park use. In this particular case, the trial court had apparently agreed with the Virginia Department of Transportation (VDOT) that the condemnation valuation of "property used as a park or an open space" could be based on four "comparable" sales to establish a "fair market value" of \$2,125 per acre.

NRPA maintained that just compensation for private land donated for public park purposes, and subsequently taken through condemnation proceedings, should not be based upon so-called "comparable" sales which had little or no connection to the value of land in a metropolitan area. Instead, NRPA maintained that the lack of a true market value (i.e., what a willing buyer would pay in cash to a willing seller) for land restricted to public park use dictated deviation from this standard of measure of just compensation in condemnation proceedings. Specifically, NRPA argued as follows that a "substitute facilities" approach was more appropriate in this particular situation.

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

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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...

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.

In this particular instance, the market value of functional replacement land adjacent to the park was appraised at \$125,000 per acre at the time of the taking. While not specifically adopting the "substitute facilities" doctrine, the Supreme Court of Virginia apparently agreed with NRPA's position in this case. As described below, the Supreme Court of Virginia, in its opinion issued February 25, 1994, would require VDOT to provide compensation sufficient to acquire of functional replacement land for the public park acreage taken for highway development.

You Pave It, You Buy It

In the case of *Fairfax County Park Authority v. Virginia Department of Transportation*, Record No. 930391, the Fairfax County Park Authority (FCPA) appealed the valuation method used to determine the amount of a condemnation award. In this particular instance, dedicated parkland was taken by the Virginia Department of Transportation (VDOT) for a highway project. The facts of the case were as follows:

In 1970, David Lawrence executed a trust agreement dedicating a 639-acre parcel to be used as a park. The trust agreement names Fairfax County Park Authority (FCPA) as the beneficiary in possession of the trust so long as the property in the trust is used as a public park dedicated to the memory of Ellanor C. Lawrence. If the property is used for any other purpose, title to the land passes to the trustees of the St. John's Episcopal Church, who then own the land free from any restrictions. In the event of condemnation, the trust agreement requires the FCPA to contest the condemnation proceedings in "every fashion reasonably possible," but condemnation of a portion of the park land does not pass the remaining property to the Church.

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In 1988, the Virginia Department of Transportation (VDOT) filed a certificate of condemnation for approximately 13 acres of the park property to expand and improve existing roadways. The certificate subsequently was amended to reduce the taking to 2.6497 acres in fee simple, 1.0584 acres for a temporary easement, and .3685 acre for a drainage easement.

VDOT filed a motion seeking to establish the criteria for valuation of the condemned park property. The trial court ruled that the measure of compensation was the property's fair market value as restricted by the trust. The parties waived a hearing before commissioners and presented evidence to the trial court of the value of the condemned property restricted to use as a park.

VDOT's appraisal witness, Edward S. Williams, III, testified that the value of the property used as a park or an open space was \$2,125 an acre based on four sales he considered comparable. Clyde A. Pinkston, the appraisal witness presented by FCPA, testified that there was no market for park land and, therefore, the property, if restricted to use as a park, had no market value. If used for residential purposes, Pinkston testified that the condemned property would have a market value of \$125,000 an acre.

The trial court, treating the land as park land, held that "there was a market for the property as park land and accepted Williams's appraisal of \$2,125 an acre." Accordingly, the court entered a final order setting the condemnation award at \$6,450. FCPA appealed to the state supreme court.

On appeal, FCPA contended that "the trial court erred in holding that the value of the condemned land must include consideration of its restricted use." As described by the state supreme court, the specific issue to be resolved was "the appropriate basis for valuing land subject to a trust agreement providing that ownership of the land vests in a church if it is used for purposes other than a park." In addition, the state supreme court acknowledged that this issue presented a case of "first impression" in Virginia. "We have not previously determined whether use restrictions such as those present in this case should be applied in determining the amount of the condemnation award."

As noted by the supreme court, the trial court in this particular instance had found the minimal amount of parkland taken to be relevant in determining fair market value for condemned land with use restrictions.

In reaching this conclusion, the trial court acknowledged that cases in other jurisdictions have taken contrary positions. Some jurisdictions value the land based on the restricted use while others disregard such restrictions... The trial court elected to follow those cases which required consideration of the restricted use because of their factual

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similarities to this case. In each instance, the land taken comprised only a small portion of the condemnee's parcel.

Contrary to the trial court's opinion, the state supreme court found "this factor -- the amount of land taken relative to the amount left the owner -- has little relevance to determining just compensation due as measured by fair market value, the standard mandated in condemnation proceedings in this Commonwealth (Va. Const. art. I, sec. 11)". Accordingly, the state supreme court found it "must look to other grounds for determining the appropriate treatment of the use restriction in valuing the land taken in this condemnation proceeding." In so doing, the state supreme court noted earlier condemnation cases which had held "that similar use restrictions should not be taken into account when valuing land for taxation purposes." Specifically, the state supreme court had held that "it is the fair market value of the land, not the value of the land to the owner, which is subjected to taxation."

Therefore, the market value of the land is derived by considering the various uses to which the land is susceptible, not just those uses to which a particular owner may be restricted. If, however, the land is so committed to a particular use that it cannot be put to another use economically, we held that, under those circumstances, it is appropriate to take the committed use of the land into consideration when determining the market value of the land.

Applying these principles to the facts of the case, the state supreme court held that "the fair market value of the property condemned in this case should be calculated without regard to the use restrictions placed on it by the trust agreement."

While these principles establish the circumstances under which use restrictions should be considered in calculating the fair market value of property in the context of real property taxation, we see no reason why they should not be applied in the context of the instant case.

Fair market value of land is used not only for taxation purposes, but, as we have said, it is the prescribed method for determining the amount of "just compensation" due in condemnation proceedings. To adopt one set of principles for determining the fair market value of real property in a condemnation proceeding and another set to make the same determination for taxation purposes could result in a single parcel of land having more than one fair market value. Such a result would be inconsistent and inequitable and is unnecessary.

These principles are consistent with the condemnation jurisprudence of this

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Commonwealth... [While] land is valued from the point of view of an owner rather than the condemnor, the value established is not the value to the owner personally. A determination of a particular owner's loss relative to that of others is only undertaken in the second step of the condemnation proceeding in which the condemnation award is allocated among those with interests in the property. Virginia Code Sec. 25-46.28

Finally, there is no evidence here that the condemned land was so committed to use as a park that it was not economically feasible to put the land to other uses. In fact, the trial court held that the highest and best use of the property was for residential purposes. There were no legal impediments to that use. Nor are future improvements required to adapt it for residential use.

The state supreme court, therefore, reversed the order of the trial court and remanded (i.e., sent back) this case to the trial court "for further proceedings consistent with this opinion." On remand, the trial court would, therefore, revise the condemnation award to reflect "just compensation" based upon "the fair market value of the highest and best use" of land held in public trust for park purposes. As note above, in 1988, this method of valuation would have provided FCPA \$125,000 per acre for the condemned park land, rather than the \$2,125 per acre awarded by the trial court.