

**[J-104-2000]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**WESTERN DISTRICT**

IN RE: CONDEMNATION BY THE : No. 102 WAP 1999  
COMMONWEALTH OF PENNSYLVANIA, :  
DEPARTMENT OF TRANSPORTATION, : Appeal from the Order of the  
OF RIGHT OF WAY FOR STATE ROUTE : Commonwealth Court entered March 18,  
79, SECTION W10, A LIMITED ACCESS : 1999, at No. 1055CD1997, reversing the  
HIGHWAY, IN THE TOWNSHIP OF : Order of the Court of Common Pleas of  
CECIL : Washington County entered April 18,  
: 1997, at No. 93-2357.  
:  
APPEAL OF: COMMONWEALTH OF : 727 A.2d 618 (Pa. Cmwlth. 1999)  
PENNSYLVANIA, DEPARTMENT OF :  
TRANSPORTATION : ARGUED: September 11, 2000

**DISSENTING OPINION**

**MR. CHIEF JUSTICE ZAPPALA**

**DECIDED: JUNE 17, 2002**

I agree that Condemnee, Dennis Sluciak, was not required to file preliminary objections to the declaration of taking filed by Condemnor, the Commonwealth of Pennsylvania, Department of Transportation, pursuant to Section 406 of the Eminent Domain Code,<sup>1</sup> hereinafter "the Code." Yet, I cannot agree that, under Section 602(a) of the Code, evidence of the Department's February 1997 condemnation of the driveway that runs across Rudolph and Marian Dagsher's property, hereinafter "the driveway," is inadmissible in determining the fair market value of Condemnee's remaining property.

Section 601 of the Code states that "[t]he condemnee shall be entitled to just compensation for the taking, injury or destruction of his property, determined as set forth in

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<sup>1</sup> Act of June 22, 1964, Sp.Sess., P.L. 84, arts. I to IX, *as amended*, 26 P.S. §§ 1-101 to 1-903.

this article."<sup>2</sup> 26 P.S. § 1-601 (emphasis added). To determine the amount of just compensation to which a condemnee is entitled, we look to Section 602 of the Code, which provides, in pertinent part:

**§ 1-602. Measure of damages**

(a) Just compensation shall consist of the difference between the fair market value of the condemnee's entire property interest immediately before the condemnation and as unaffected thereby and the fair market value of his property interest remaining immediately after such condemnation and as affected thereby, and such other damages as are provided in this code.

26 P.S. § 1-602(a) (emphasis added). In applying this analysis, courts must make two assessments of the fair market value of a condemnee's property interest: one immediately before and one immediately after the taking.

While the Code demands that courts assess fair market value at two exact moments in time, it simultaneously recognizes that the fair market value itself could be affected by considerations that occur later in time. To clarify the proper considerations in calculating the fair market value of a condemnee's property interest, Section 603 of the Code defines "fair market value" as:

**§ 1-603. Fair market value**

Fair market value shall be the price which would be agreed to by a willing and informed seller and buyer, taking into consideration, but not limited to, the following factors:

- (1) The present use of the property and its value for such use.
- (2) The highest and best reasonably available use of the property and its value for such use.

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<sup>2</sup> In Pennsylvania, a condemnee's right to just compensation derives from the Pennsylvania Constitution, Article I, Section 10 ("[N]or shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured.") and Article X, Section 4 ("Municipal and other corporations invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements and compensation shall be paid or secured before the taking, injury or destruction.").

(3) The machinery, equipment and fixtures forming part of the real estate taken.

(4) Other factors as to which evidence may be offered as provided by Article VII.

26 P.S. § 1-603 (emphasis added). Thus, fair market value subsumes all of the factors within Section 603, as well as additional evidence permitted under Article VII.

Article VII, as invoked by Section 603, contains the Code's evidentiary rules for eminent domain proceedings. See 26 P.S. §§ 1-701 to 1-706. Section 702 allows condemnors to "present expert testimony of the amount of damages suffered by the condemnee." 26 P.S. § 1-702. Concurrently, Section 705 of the Code liberally outlines the extent of such expert testimony:

**§ 1-705. Evidence generally**

Whether at the hearing before the viewers, or at the trial in court on appeal:

\* \* \*

(2) A qualified valuation expert may testify on direct or cross-examination in detail as to the valuation of the property ..., which testimony may include but shall not be limited to the following:

\* \* \*

(v) The cost of adjustments and alterations to any remaining property made necessary or reasonably required by the condemnation.

26 P.S. § 1-705(2)(v) (emphasis added) (irrelevant portions omitted).

Adjustments and alterations to a condemnee's remaining property, as admissible under Section 705(2)(v), are by their very nature implemented after condemnation and usually after completion of the public work. Likewise, the costs of these "cures" are not expended until after the taking. Nonetheless, the Code mandates consideration of these post-condemnation factors in determining fair market value. Thus, Section 705 permits evidence of future curative measures that may properly affect the fair market value as

assessed immediately before or immediately after the taking.<sup>3</sup> Indeed, the *Comment* to Section 705(2)(v) reaffirms that "[t]hese matters, in keeping with the liberalization of the examination of the expert, should properly be considered since they affect fair market value."

Here, Condemnor maintained Condemnee's uninterrupted access to the property by condemning the driveway.<sup>4</sup> While Condemnor implemented this curative measure after it had already condemned Condemnee's frontage along Grudevich Road, the Code clarifies that its significance is not lost in determining fair market value. Specifically, condemnation of the driveway constitutes an adjustment or alteration to Condemnee's property under Section 705(2)(v), as it forever maintains Condemnee's rights of access, ingress, and egress. This adjustment of Condemnee's property rights is curative in nature and comports with the types of cures admissible under Section 705(2)(v). As the Legislature deemed that these cures "should properly be considered since they affect fair market value[.]" see *Comment* to Section 705(2)(v), the Commonwealth Court erred in reversing the order of the trial court, which admitted evidence of the driveway's condemnation in determining that Condemnee's property was not permanently landlocked.

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<sup>3</sup> The Legislature's liberal approach to the admissibility of future considerations in determining fair market value is apparent throughout the Code. See *generally* 26 P.S. § 1-705(2)(i) (permitting evidence of condemned property's sale price, if sale was made within reasonable time before or after condemnation); 26 P.S. § 1-705(2)(ii) (permitting evidence of condemned property's rental income under lease, if lease was in effect within reasonable time before or after condemnation); 26 P.S. § 1-705(2)(iv) (permitting evidence of the cost of replacing or reproducing existing improvements on the land); 26 P.S. § 1-705(3) (permitting parties to show difference between condition of property and neighborhood at the time of condemnation and at the time of view). Unlike Subsections (2)(i) and (2)(ii) of Section 705, Subsection (2)(v) does not entail a "reasonable time" element.

<sup>4</sup> Section 617.1 of the Code suggests that condemnors may "use a substitute for monetary just compensation." 26 P.S. § 1-617.1. While it is appealing to regard the condemnation of the driveway as a substitute for monetary just compensation in this case, Condemnor does not mention Section 617.1 in its brief.

In operation, this result allows the trial court to realistically assess Condemnee's damages, as a willing and informed seller and buyer would agree to a substantially higher price for a parcel of landlocked property if they were certain that access would eventually be permanently secured. Thus, as assessed immediately after the taking, the fair market value of Condemnee's remaining property would properly be affected by: (1) a technical and temporary landlocking, during which Condemnee never actually lost access; and (2) the condemnation of the driveway, which permanently secured Condemnee's right of access.

The majority's result, which compensates Condemnee for a permanent landlocking, belies the very import of just compensation. Condemnee's compensation is, as here purported, essentially not just; it effectively has become an unwarranted windfall. Furthermore, under the majority's analysis, Condemnor is mandated to pay twice: once to condemn the driveway, and once for the assumed landlocking. This, in my opinion, is unacceptable. Accordingly, I would reverse the order of the Commonwealth Court.

The majority relies wholly on the language of Section 602(a), which requires assessment of fair market value immediately before and immediately after the taking. Yet, its analysis fails to acknowledge the Code's liberal approach to expert testimony in determining fair market value. Indeed, the majority's analysis does not consider the Code's definition of fair market value in Section 603 or any of the factors therein, such as those admissible under Article VII. The majority summarily dismisses Condemnor's reliance on Section 705(2)(v) by stating that "[t]his case, however, involves the proper construction of Section 602(a)." Majority Op. at 18. Despite this assertion, a proper construction of Section 602(a) requires Section 603's definition of fair market value, which in turn is expressly affected by evidence admissible under Article VII and, specifically, Section 705(2)(v). See 1 Pa.C.S. § 1932 (requiring that statutes *in pari materia* shall be construed together).

Furthermore, the majority's analysis is premised entirely upon pre-Code decisions; as the Code signified an explicit change in the law, the majority's dependence on these cases is inappropriate. First, the majority relies on Dyer v. Commonwealth, 152 A.2d 760 (Pa. 1959). Dyer, however, is no longer reliable authority. In Dyer, we strictly adhered to the "before and after rule" because of our concern that permitting post-condemnation evidence "would be not only contrary to our salutary and well-established 'before' and 'after' rule but would be productive of an impractical and unworkable measure of damages." Dyer, 152 A.2d at 763. We further stated our suspicions that:

Proofs of countervailing collateral matter will follow the introduction of collateral matter; confusion of the issue on trial will be worse confounded; and litigation over the damages for land taken by condemnation will become truly interminable.

Id. at 763 n.4 (quoting Berger v. Public Parking Auth. of Pittsburgh, 109 A.2d 709, 719 (Pa. 1954)). Hence, Dyer mandated strict compliance with the common law "before and after rule" because of this Court's antagonism towards the introduction of collateral issues in determining just compensation.

The Legislature, however, has since enacted the Code, which became effective on June 22, 1964. 26 P.S. § 1-302. The *Comment* to Section 705 reveals that the Legislature intended a liberal approach to the admissibility of future considerations in determining fair market value: "It is intended by this clause to change existing law which severely restricts the testimony of the expert witness on the ground that 'collateral issues' are introduced." The Legislature's express intent to broaden the scope of expert testimony clearly evinces its disagreement with our holding in Dyer. Thus, I find the majority's reliance on Dyer unsupportable.

Second, the majority relies on Frontage, Inc. v. Allegheny County, 162 A.2d 1 (Pa. 1960). Like Dyer, we decided Frontage before the Legislature enacted the Code. Thus,

Frontage could not have contemplated the Legislature's intent to broaden the scope of expert testimony regarding fair market value.

Moreover, Frontage is distinguishable on its facts. The condemnee in Frontage owned 8,859 acres of property that lay adjacent to the Pittsburgh airport and fronted along 1,080 feet of the airport parkway. Two separate government takings affected this property. First, in 1955, the Governor and the Secretary of Highways publicly indicated their intent to designate the airport parkway as a "limited access highway."<sup>5</sup> The designation would have completely severed the condemnee's access to the airport parkway, but, as the Secretary of Highways never submitted plans for the designation, the condemnee maintained access to the parkway throughout the litigation of Frontage. Id. at 4. Second, in 1956, Allegheny County condemned the property to expand the airport.

In a jury trial to determine the condemnee's just compensation for the condemnation, the County argued that that the seemingly imminent "limited access highway" designation had depreciated the pre-condemnation fair market value of the condemnee's property. On appeal, however, this Court held that condemnors may not seek to depreciate the pre-taking value of a condemnee's property on account of "a threat to condemn or a threat to limit [a] property's access to an abutting highway." Id. at 5.

The case *sub judice* does not ask whether the effect of a seemingly imminent highway designation or condemnation is admissible regarding a property's pre-condemnation value. Rather, this Court must here determine whether the effect of a curative adjustment or alteration is admissible regarding a property's post-condemnation fair market value. Indeed, the Code distinguishes between imminent condemnations that

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<sup>5</sup> The Limited Access Highways Act defines a limited access highway as "a public highway to which owners or occupants of abutting property or the traveling public have no right of ingress or egress to, from or across such highway, except as may be provided by the authorities responsible therefor." Act of May 29, 1945, P.L. 1108, §§ 1-15, as amended, 36 P.S. §§ 2391.1-2391.15.

depreciate pre-taking value, as was the case in Frontage, and evidence of future curative measures affecting post-taking value, as is the case here. Section 604 of the Code provides:

**§ 1-604. Effect of imminence of condemnation**

Any change in the fair market value prior to the date of condemnation which the condemnor or condemnee establishes was substantially due to the general knowledge of the imminence of condemnation, other than that due to physical deterioration of the property within the reasonable control of the condemnee, shall be disregarded in determining fair market value.

26 P.S. § 1-604. Thus, the Code, which permits evidence of post-condemnation curative adjustments and alterations, *see supra*, expressly excludes evidence of the depreciating effects of an imminent condemnation on the pre-taking value of a condemnee's property.<sup>6</sup>

In view of the Code's disparate treatment, I fail to find Frontage, a pre-Code decision, persuasive or even relevant.

Therefore, I dissent.

Mr. Justice Castille joins this dissenting opinion.

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<sup>6</sup> While our Court has never expressly held that a "limited access highway" designation is a condemnation that constitutionally requires just compensation, there is strong evidence that a landowner's loss of access would require just compensation. Indeed, the United States District Court for the Western District of Pennsylvania held that the Limited Access Highways Act is unconstitutional, as it only provides compensation to landowners whose property is actually taken, thus denying compensation to landowners that lose access due to a "limited access highway" designation. Creasy v. Stevens, 160 F. Supp. 404 (W.D. Pa. 1958), *probable jurisdiction noted*, 358 U.S. 807 (1958), *reversed* 360 U.S. 219 (1959) (holding that, since condemnees' right to just compensation for loss of access may be protected in a proceeding before viewers, the District Court erred in entertaining a federal action where the condemnees had not yet proceeded before viewers); *see also* Breinig v. Allegheny County, 2 A.2d 842, 847 (Pa. 1938) (noting that right of access, ingress, and egress cannot be taken without compensation under the law; it is a property right, protected by the Constitution).