RELEVANCE AND ADMISSIBILITY OF EVIDENCE OF ENVIRONMENTAL CONTAMINATION IN AN EMINENT DOMAIN VALUATION TRIAL

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INTRODUCTION

The Fifth Amendment of the United States Constitution states, "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[1] The Florida Constitution echoes the "takings clause," providing that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to each owner."[2]

Florida law has held that "the constitutional provision for full compensation requires that the courts determine the value of the property by taking into account *all* facts and circumstances which bear a reasonable relationship to the loss occasioned by the owner by virtue of the taking of his property under the right of eminent domain."[3]

Recently, Florida courts have encountered the issue of environmentally contaminated properties being condemned by governmental entities. As a result of this encounter, courts now must resolve the issue of whether juries should consider environmental contamination and remediation as facts or circumstances which reasonably relate to the loss occasioned by the owner when the government

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1. U.S. CONST. amend. V.

2. FLA. CONST. art. X, § 6(a).

3. Jacksonville Expressway Auth. v. Henry G. Du Pree Co., 108 So. 2d 289, 291 (Fla. 1958) (emphasis added).

acquires the owner's property. The Florida Supreme Court recently decided *Finkelstein v. Department of Transportation*,[4] a pivotal case which illustrates the problems that a condemning authority now faces when it seeks to acquire contaminated property.

This Note will discuss these problems and will examine the reasoning of the Florida Supreme Court in *Finkelstein* and the reasoning in Judge Anstead's special concurrence. Critical analysis will demonstrate that the Florida Supreme Court erroneously interpreted the Early Detection Incentive program and programs like it as exclusive remedies; and this interpretation will cause future difficulties. This Note will criticize the majority's reasons for insisting upon using contaminated comparables as factual bases for expert opinions on valuation. Finally, the Note will suggest an alternative approach to valuation of contaminated property which incorporates uncontaminated value, remediation costs, and a current definition of "stigma."

THE FINKELSTEIN *CASE*

Factual Background

Prior to December 1988, Petitioner Tenneco Oil Company (Tenneco) discovered petroleum ground-water contamination beneath a gas station site which Tenneco leased and operated and that Petitioners Ida Finkelstein and Alice Fox owned.[5] Tenneco reported the contamination to the Department of Environmental Regulation, as required by Florida Statutes section 376.3071(9)(b), and the property was determined eligible for the Early Detection Incentive (EDI) program under which property owners may apply for federal funding for the cleanup.[6]

Respondent Department of Transportation (DOT) filed a declaration of taking and petitioned the court to condemn the property.[7] The court ordered the taking and DOT obtained title to the property in May 1990.[8] Before the valuation trial, DOT moved in limine that

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4. 656 So. 2d 921 (Fla.), *reh'g denied* (July 5, 1995).

5. State Dep't of Transp. v. Finkelstein, 629 So. 2d 932 (Fla. 4th Dist. Ct. App. 1994).

6. 656 So. 2d at 923.

7. 629 So. 2d at 932.

8. *Id.*

the court admit evidence that petroleum hydrocarbon contaminated the property and that the court admit evidence of the cleanup costs.[9] DOT asserted that the contamination affected the value of the property, and that under Florida law, Tenneco was responsible for cleanup costs.[10]

The trial court denied the motion in limine and excluded the evidence of contamination, reasoning that the evidence was irrelevant since the property was eligible at the time of taking for EDI reimbursement of cleanup costs.[11] The judge did not permit DOT to proffer testimony of three expert witnesses who would have testified that: (1) petroleum hydrocarbons contaminated the property at the date of valuation and the extent of the contamination; (2) estimated cleanup costs ranged between $750,000 to $800,000; (3) it is routine practice for buyers, sellers, and lenders to request contamination assessments of real property; (4) banks hesitate to finance contaminated property or to take it back in default; and (5) contamination results in additional costs for assessing contamination, use restrictions, and the "stigma" of contamination which remains even after cleanup and reduces the property market value by at least twenty to twenty-five percent.[12]

Because the judge did not allow the jury to hear this evidence, the jury valued the property as if it had never been contaminated, which is a fiction that all parties agreed was not true.[13] The Fourth District Court of Appeal reversed and held that the expert testimony which DOT attempted to offer regarding the contamination and cleanup cost was relevant to property value at the time of taking and relevant concerning the effect of the stigma resulting from contamination on potential buyers' perception of the property's value.[14] Petitioners appealed, and the Florida Supreme Court granted certiorari.[15]

The Florida Supreme Court held that evidence of environmental contamination is relevant and admissible in an eminent domain valuation trial where there is a sufficient factual predicate upon

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9. *Id.* at 933.
10. *Id.*
11. 656 So. 2d at 923.
12. *Id.*
13. *Id.*
14. 629 So. 2d at 934.
15. Finkelstein v. Department of Transp., 648 So. 2d 722 (Fla. 1994).

which to conclude that the contamination does affect the market value of the property.[16] The court held that cleanup costs in this case had no bearing on property value and were thus not admissible since those costs were to be paid by neither Petitioner nor Respondent, but by EDI.[17]

The court found that because the trial court prevented DOT from showing sufficient factual predicate by refusing to admit DOT's proffer into evidence, this prevented the supreme court from deciding whether contamination reduced the market value of the property.[18] Furthermore, the trial court had so severely limited DOT's proffer that the record was unclear on appeal whether or not the expert based the opinion supporting property value decrease on sales "of comparable contaminated property which has been successfully cleaned," as the Florida Supreme Court required.[19]

The supreme court therefore approved the district court's reversal of the trial court's judgment and remanded with instructions that the trial court order a complete proffer of expert testimony which it had previously excluded. The trial court should determine whether that testimony is admissible under the analysis which the supreme court set forth in this decision, including evidence of sales of comparable contaminated property "successfully cleaned."[20]

Justice Anstead specially concurred on the decision.[21] He questioned the majority's imposition of restrictions placed upon valuation evidence.[22] Rather, Anstead preferred to let courts decide issues of valuation and evidence under prevailing law.[23]

HISTORICAL OVERVIEW

In eminent domain proceedings, courts have historically considered all facts and circumstances that would be reasonably considered in the purchase and sale of the property. In *Florida Power & Light Co. v. Jennings*,[24] the Florida Supreme Court held in a con-

16. 656 So. 2d at 922.
17. *Id.* at 923–24.
18. *Id.* at 924.
19. *Id.* at 925.
20. 656 So. 2d at 925.
21. *Id.* at 926 (Anstead, J., concurring).
22. *Id.*
23. *Id*.
24. 518 So. 2d 895 (Fla. 1987).

demnation proceeding that any factor, including public fear, which affects market value of the property, is admissible in property valuation and can provide the basis for an expert's valuation opinion.[25] The Florida Supreme Court held that a jury may determine whether a real property expert has based a valuation opinion upon reasonable factors without evidence concerning the reasonableness of the buying public's fears.[26] The Florida Supreme Court cited *Jennings* as persuasive authority in deciding *Finkelstein*.[27]

In *Davey Compressor Co. v. City of Delray Beach*,[28] the city sued for past damages and future response costs against a firm for polluting the city groundwater supply. The Florida Supreme Court held the proper measure of damages to be either diminution in value or actual remediation costs, whichever is greater.[29] Although *Davey Compressor* did not involve eminent domain, the damages principle is applicable to the valuation question in *Finkelstein*.

With the exceptions of *Finkelstein* and *Jennings*, there are few competent cases which set precedent in Florida on whether to admit evidence of contamination and remediation in an eminent domain proceeding. It is thus necessary to review out-of-state case law for an analysis of admissibility.

CASES HOLDING CONTAMINATION EVIDENCE ADMISSIBLE

The Colorado Court of Appeals in *Department of Health v. Hecla Mining Co.*,[30] held, in a proceeding to condemn contaminated property for the purpose of cleaning it up, that jurors could consider evidence of contamination in assessing value of property. However, jurors could not consider evidence of an increase in value of the property that might result from the proposed decontamination because the owner should not get the increase in property value from the cleanup when the government paid for it.[31]

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25. Swift & Co. v. Housing Auth., 106 So. 2d 616 (Fla. 2d Dist. Ct. App. 1958).

26. 518 So. 2d at 898. The premise behind *Jennings* has since been modified by statute prohibiting the state from considering electromagnetic fields from power lines in valuing property. FLA. STAT. § 73.0715 (1995).

27. 629 So. 2d at 934.

28. 639 So. 2d 595 (Fla. 1994).

29. *Id.* at 596.

30. 781 P.2d 122 (Colo. Ct. App. 1989).

31. *Id.* at 126–27.

In *T & E Industries, Inc. v. Safety Light Corp.*,[32] the New Jersey Supreme Court held that an owner of contaminated property who established liability of the former property owner could not recover from the former owner the diminution of value of the land (stigma) which the contamination caused. However, the present owner could recover cleanup costs and the value of the structures on the property that would be demolished in the cleanup.[33]

In *State v. Brandon*,[34] the court defined "fair cash market value" as the price a willing buyer would pay a willing seller at the time of the taking considering all potential uses of the property.[35] The court defined "just compensation" for property the government takes for public use as the estimate of the fair cash value of the property if the owner were willing to sell and a purchaser willing to buy that particular property at that place and in that form.[36] The *Brandon* court found contamination undoubtedly relevant to valuation and that "the mere fact that the property is, or has been contaminated, may have a direct bearing upon the value of the property in the marketplace."[37]

In *Redevelopment Agency v. Thrifty Oil Co.*,[38] the court held that the cost of cleaning up gasoline spillage contamination was properly before the jury in an eminent domain proceeding because the contamination and remediation costs were property characteristics that would affect its value.[39] The Florida Supreme Court cited *Thrifty Oil* as persuasive in its *Finkelstein* opinion.[40]

In another eminent domain action, *City of Olathe v. Stott*,[41] the Kansas Supreme Court held evidence of petroleum contamination admissible in an eminent domain proceeding to determine fair market value of property.[42] The Kansas Storage Tank Act reimbursed cleanup costs, but the court found the Act was not an exclusive remedy because it did not reimburse all costs associated with contami-

32. 587 A.2d 1249 (N.J. 1991).
33. *Id.* at 1262–63.
34. 898 S.W.2d 224 (Tenn. Ct. App. 1994).
35. *Id*. at 226.
36. *Id.*
37. *Id.* at 228.
38. 5 Cal. Rptr. 2d 687 (Ct. App. 1992).
39. *Id*. at 691.
40. 629 So. 2d at 934.
41. 861 P.2d 1287 (Kan. 1993).
42. *Id*. at 1295–96.

nation.[43]

In *Colorado Department of Health v. The Mill*,[44] the Colorado Supreme Court held that in a condemnation proceeding for government cleanup of the site of former uranium mill, the property owner should receive a discounted value for the property to avoid "windfall profit" to the owner.[45]

In *Brandon*, the Tennessee Court of Appeals, citing *Olathe* and *Jennings*, held evidence of contamination of a former service station admissible in determining fair market value in an eminent domain action; the court held that cost of remediation is not the only value-related effect of contamination.[46]

CASES HOLDING CONTAMINATION EVIDENCE INADMISSIBLE

The Connecticut Superior Court, in *Murphy v. Town of Waterford*,[47] held evidence of cleanup costs inadmissible in the taking of a gas station site because there were other statutory remedies to recover costs, the owner had to sell the property while contaminated, and there was no proof that the owner was the polluter.[48]

In *Wray v. Duffy & DeBlass*,[49] the Ohio Court of Appeals held evidence of contamination cleanup costs inadmissible in an eminent domain action, when fair market value was determined at the date of the taking, the law did not require the owner to clean up the contamination.[50]

In *Department of Transportation v. Parr*,[51] the Illinois Appellate Court held in an eminent domain action that evidence of contamination cleanup costs, which exceeded the "clean" value of the property, were inadmissible because the DOT had failed to prove contamination and because, even if contamination were proven, costs of

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43. *Id.* at 1292.
44. 887 P.2d 993 (Colo. 1994).
45. *Id*. at 1005–06.
46. 898 S.W.2d at 226–27.
47. No. 520173, 1992 WL 170588 (Conn. Super. Ct. July 9, 1992) (not reported in A.2d).
48. *Id*. at *10–*11.
49. No. 91-B-37, 1993 WL 12253 (Ohio Ct. App. Jan. 19, 1993) (not reported in N.E.2d).
50. *Id*. at *1.
51. 633 N.E.2d 19 (Ill. App. Ct.), *appeal denied,* 642 N.E.2d 1276 (Ill. 1984).

remediation should be recovered under the state Environmental Protection Act rather than under the state Eminent Domain Act.[52]

THE FLORIDA SUPREME COURT'S ANALYSIS IN FINKELSTEIN

In answering the question of "[w]hether evidence of environmental contamination is relevant and otherwise admissible in an eminent domain valuation trial," the Florida Supreme Court upheld the district court decision that evidence of present or past contamination is relevant to property market value regarding direct costs of cleanup, to possible financing problems, to risk of future liability under CERCLA or to the public, and to the reduction of market value even after cleanup due to "stigma."[53]

Only the portion of the district court's opinion admitting evidence of remediation costs was quashed.[54] The court reasoned that evidence of cleanup costs was irrelevant under the facts of this particular case because the property qualified for EDI cleanup reimbursement at the time of the taking.[55] In that regard, the court specifically limited its holding to the facts of this case, noting that this holding does not address situations where a reimbursement program is not available.[56]

The court held that the property should be valued as if it had already been "successfully" cleaned at the time of taking.[57] The court remanded the case for the trial court to determine, after a complete proffer of DOT's experts' testimony, whether the experts' opinions had "a basis in facts and data reasonably relied upon by experts in the field of real property valuation."[58]

The majority opinion stated that sales of comparable contaminated property must be included in order for the evidence of the decrease in property value to be admissible.[59] Judge Anstead generally concurred with the majority, but criticized the majority's impo-

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52. *Id.* at 21–22.
53. 656 So. 2d at 922, 924.
54. *Id.* at 925.
55. *Id.*
56. *Id.*
57. *Id.*
58. 656 So. 2d at 925.
59. *Id.*

sition of additional restrictions on evidence of valuation; Anstead preferred to "leave the issues of evidence and valuation to be resolved according to prevailing law."[60]

CRITICAL ANALYSIS

The supreme court stated, "[w]e agree with the district court that evidence of the fact that property is or has been contaminated is relevant to the market value of property in an eminent domain valuation proceeding."[61] However, the court also commented, "[w]e limit our holding in this regard to the facts of this case, in which there was a program for reimbursement of the remediation costs. We do not decide whether remediation costs would be relevant in a valuation proceeding which involved property for which such reimbursement was not available."[62] The court appears to have approved stigma and not actual costs.

THE EDI AS AN EXCLUSIVE REMEDY

The court erred in relying on the illusory remedy of the EDI program. This holding shows the court's basic lack of knowledge of the EDI program. First, the EDI program does not cover all costs.[63] It does not cover, for example, reductions in value such as stigma. Furthermore, the EDI provision states that it will initiate cleanup "provided there are sufficient unencumbered funds."[64] The EDI program is underfunded, and there is no guarantee that the program will have sufficient funds to reimburse costs at all.

Compare contaminated property to a house with a leaky roof. When a prospective buyer sees water spots on the ceiling, the buyer most likely will not pay the same price he would be willing to pay if the spots were not there. Even if there is evidence that someone repaired the roof and fixed the leak, the prior leaks give the house a "stigma" because the buyer fears more leaks in the future and possible hidden damage in the house.

Similarly, when property has present or past contamination, a

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60. *Id.* at 926 (Anstead, J., concurring).
61. *Id*. at 924.
62. *Id*.
63. 1995 Fla. Sess. Law Serv. 376.3071 (West).
64. *Id.*

prospective buyer will most likely not be willing to pay the price he would have paid for uncontaminated property. Furthermore, as with the leaky roof, evidence that someone cleaned up the property does not ameliorate the problem. The prior contamination gives the property a "stigma" because the buyer fears, among other things, that someone will discover further hidden contamination.

"`Stigma' may be defined as the `reduction in value caused by contamination resulting from the increased risk associated with the contaminated property.'"[65] The stigma which prospective buyers associate with contaminated property has several sources, including a prospective buyer's concerns regarding: potential stricter joint and several liability under CERCLA or similar statutes for actual remediation costs which may exceed estimates; lender reluctance to finance contaminated property; and potential liability to the public due to the contamination.[66]

VALUATION

The Florida Supreme Court stated "[w]e hold that evidence of contamination is relevant and admissible on the issue of market value in a valuation trial if there is a sufficient factual predicate upon which to conclude that the contamination does affect the market value of the property taken."[67] "We do decide that evidence of contamination is relevant to market valuation and is admissible upon an *adequate factual predicate.*"[68] In discussing valuation, the court maintained:

> For a real property expert's opinion of a reduction of market value to be admissible it must have a basis in facts and data reasonably relied upon by experts in the field of real property valuation, section 90.704, Florida Statutes (1993), and pass the test of section 90.705(2), Florida Statutes (1993) . . . . There must be a factual basis through evidence of sales of comparable contaminated property upon which to base a determination that contamination has decreased the value of the property.[69]

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65. 656 So. 2d at 924.
66. *Id.* at 922.
67. *Id.*
68. *Id.* at 925 (emphasis added).
69. 656 So. 2d 925.

"Any comparable sales which DOT's expert uses as a basis for an opinion that contamination has resulted in a decrease in value must be of comparable contaminated property which has been successfully cleaned."[70] The court does not define "successfully cleaned." Does it mean a "no further action" letter? Does it mean base soil results comparable with common soil conditions and zero parts per million? What about the risk of subsequent discovery of further contamination, e.g. by substances which the EPA newly identifies as harmful? What about subsequent development of technology enabling more extensive cleanup?

The biggest problem with requiring contaminated comparables is that there are currently few relevant comparables, thus necessitating major appraisal adjustments. Instead, the court should consider uncontaminated comparables with cleanup costs and stigma as adjustments.

Justice Anstead disagreed with the majority's suggestion that appraisals should include contaminated comparables, stating in his special concurrence, "I am uncertain about the effect of the opinion in imposing additional restrictions on evidence of valuation. I would answer the certified question as framed in the majority opinion in the affirmative, and leave the issues of evidence and valuation to be resolved according to prevailing law."[71] The decision would have been better had the majority simply concurred with Justice Anstead. Courts may now try to interpret the language to suggest additional restrictions on valuation evidence when arguably the Court merely attempted to restate existing legal precedents.

LIMITING THE ADMISSIBILITY OF EVIDENCE

The court stated that "[e]vidence of contamination, because of its prejudicial nature, should not be a feature of a valuation trial beyond what is necessary to explain facts showing a reduction in value caused by contamination."[72] This statement opens the door inappropriately to creating a differing standard than those established legal standards for admissibility of other property defects such as roof leaks, dry rot and termite infestation. Under this hold-

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70. *Id.*
71. *Id.* at 926 (Anstead, J., concurring).
72. *Id.* at 925.

ing, the court might exclude evidence of who is responsible for the contamination and its effect on the environment. Where a property owner failed to comply with mandated environmental standards, the court can assume that the owner by so failing saved money. Therefore, the owner will profit through waste if the owner receives the market value of the property as if uncontaminated.

TIMING OF THE TAKING

"In this case, the timing of the taking impacts the valuation because the property was taken while in the process of being cleaned. The timing of the taking should not itself disadvantage the petitioners in valuing the property."[73] "[W]e hold in this case that the property should be valued as if the cleaning of the property had been successfully completed at the time of the taking."[74] This holding is inconsistent with the facts of this case because the property had not in fact been successfully cleaned at the time of the taking.[75]

The court's decision to value the property as if decontaminated because of the timing of the taking opens the door to all cleanup issues and creates many problems. All property owners will start cleanup to get the benefit of uncontaminated value. Such a holding is impossible to apply in a practical manner. Does a property owner who has begun cleanup receive full decontaminated value in an eminent domain proceeding even when the government pays for the cleanup, or does the DOT somehow apportion the increase in property value due to the cleanup according to which party cleaned up how much? Regardless of who paid for the cleanup, stigma and damages still exist and the court should deduct them in a valuation trial.

PROPER FORUM

An eminent domain valuation trial is a proper forum for deciding these issues. The purpose of such a trial is to determine fair market value of the property at the time of the taking. "DOT state[d] that it [did] not seek a mathematical setoff from the value of the property based upon costs of rededication and that a determination of liability for the contamination [was] not an issue in the

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73. 656 So. 2d at 925.
74. *Id.*
75. 629 So. 2d 932, 933 (Fla. 4th Dist. Ct. App. 1993).

case."[76] Those issues may be decided if necessary in a CERCLA proceeding.

CONCLUSION

All evidence relevant to the issue of full compensation should be admissible in a valuation trial; otherwise, the court will ignore issues such as stigma and risk. Evidence relating to the increased costs related to the acquisition of contamination assessments, use restrictions and the stigma of contamination affects the marketability of a property and will result in a negative impact on its value.

76. 656 So. 2d at 923.