VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 22-CV-02416

Noble Enterprises, Inc. v. State of Vermont Agency of Transportation

ENTRY REGARDING MOTION

Title: Motion for Summary Judgment; Cross Motion for Summary Judgment ; (Motion: 1; 2)
Filer: Mark A Seltzer; Hans G. Huessy
Filed Date: December 02, 2022; January 05, 2023

The motion is GRANTED IN PART and DENIED IN PART.

The present action is an appeal from a condemnation decision rendered by an administrative law hearing officer within the Vermont Agency of Transportation. The proposed taking involves permanent and temporary easements over certain lands owned by Appellant Noble Enterprises, Inc., at the intersection of Vermont Route 111 and Webster Brook in the Town of Morgan, Vermont. The Appellee Vermont Agency of Transportation (VTrans) purpose with this taking is to replace an existing drainage structure under Vermont Route 111 with a new concrete box structure that will allow the Brook to flow beneath the state highway in a safe and unimpeded manner while maintaining the integrity of the highway above. In its appeal, Appellant does not seek to challenge either the necessity of the taking or the monetary compensation offered. Instead, Appellant seeks to compel the State to make Appellant and Appellant's owner., Joe Page, co-insured entities on any contracts that the State signs with the various contractors who will be performing the work.

The State has denied this request on a variety of bases. First, the State argues that just compensation under the Vermont Constitution, Article 1, Chapter 2, and the underlying statutory structure 19 V.S.A. §§ 500, et sec. only allow monetary compensation. This position, however, is facially inconsistent with Vermont Supreme Court jurisprudence that has ruled non-monetary compensation packages are constitutional. See *Chittenden Solid Waste Dist. v. Hinesburg Sand & Gravel Co., Inc.*, 169 Vt. 153, 158–61 (1999) (approving solid waste condemnation plan for a landfill that compensated the landowners, in part, by allowing them to keep all of the sand to be removed from

the landfill); see also *United States v. 50 Acres of Land*, 469 U.S. 24, 31–33 (1984) (discussing the substitution doctrine where the government can provide substitute lands as compensation for a taking). It is also inconsistent with Vermont statutes that embed certain non-monetary compensation into the taking process. 19 V.S.A. § 507; see also *In re Agency of Transp.*, 157 Vt. 203, 207–088 (1991) (noting that issues beyond necessity and monetary compensation can be factored into the decision to incorporate a cattle pass into a condemnation proceeding). For these reasons, the State's argument that it cannot consider non-monetary compensation in a takings case is not supported by either constitutional or statutory provisions, and it is not a basis to restrict the use of non-monetary compensation.

The State's second argument is that requesting to make an Appellant a co-insured is a speculative damage. This is a confounding argument. The purpose of insurance is to create a fixed price product that individuals, businesses, and sovereigns can purchase to protect against risk. This is to say that unlike the speculative issue of compensating for potential business losses that might arise from the future reduction or loss of peace and quiet, such as in the *Coulson* case cited by the State, the compensation sought here is a known price product.[1] Cf. *Coulson v. State Highway Board*, 122 Vt. 392, 396 (1961). Given this stability and predictability, the Court finds no evidence that making Appellant a co-insured would involve speculative damages, and the proposal is entirely distinguishable from *Coulson* and similar cases where courts have refused to award damages based on future events and what ifs. Insurance, by its nature, is a present-time, fixed price investment to mitigate or remove such future risks and must be distinguished as such. If a sovereign is taking an easement on property to perform inherently dangerous activity, purchasing insurance or making the servient estate landowner a co-insured is a natural way to remove such risk without engaging in either the likelihood of the event occurring or the possible damages. For these reasons, the State's second argument is not persuasive.

Finally, the State makes the argument that the Restatement (Third) of Properties: Servitudes § 4.13 establishes an obligation and duty on the part of the State to use the temporary and permanent easements in a manner that "avoid[s] liability of the servient-estate owner to third parties." This statement is an accurate reflection of an easement holder's obligations to the owner

[1] While there is some dispute as the actual cost of adding Appellant as a co-insured, its specific cost can be determined and would be for a fixed amount that the parties could discovery in short order and would not involve speculation or be dependent on future events.

of the servient estate, but it is not, as Appellant notes, the equivalent of naming Appellant the co-insured in the various contracts that the State will be seeking from the contractors and subcontractors on this project. Being-named as a co-insured comes with the dual benefits of both insurance defense and indemnification. This goes a step beyond the obligation and liability that the Restatement is describing and ensures that if there is an incident and if Appellant is named as a defendant, then there will be a policy and defense provided. For these reasons, the State's third argument does not establish why the State is justified in denying the request to co-insure from Appellant.

While the State's arguments are not compelling, they do raise an interesting issue in the context of a taking. If the State can provide non-monetary compensation, when is it obligated to provide such compensation and when is a party obligated to accept it? The State notes that there is no caselaw for the proposition that it must alter its contracts with contractors to provide co-insurance for servient landowners. In the *Chittenden Solid Waste* case cited above, it was the Solid Waste District that proposed the non-monetary compensation as a method of keeping its costs down and the landowner who had to accept it against its objections. 169 Vt. at 160. That is the converse what is occurring here. Similarly, 19 V.S.A. § 507 provides that either VTrans or the Court impose the cattle crossing requirement. The court is not aware of an instance where a government entity—short of specific statutory language—has been obligated to offer non-monetary compensation where none has been offered or is required to be offered. In fact, the Vermont Supreme Court has warned against such judicial interference with a takings proposal. *State Transp. Bd. v. May*, 137 Vt. 320, 325 (1979) (noting that while the court may review proposals and weigh them against statutory standards it is impermissible for the court itself to create such proposals) (citing *State Highway Bd. v. Loomis*, 122 Vt. 125, 132 (1960)). This limitation appears to be very similar to the deference that courts are obligated to give administrative agencies because of their specialized knowledge and the delegation of authority by the legislature to make technical and fact-intensive determinations. See, e.g., *Plum Creek Maine Timbelands, LLC v. Vt. Dept. of Forests, Parks and Recreation*, 2016 VT 103, ¶¶28, 29, 35 (finding that where an agency has broad statutory authority and relevant expertise its methodologies are entitled to deference regardless of whether it had been reduced to a written rule or policy or was an unwritten interpretation).

Looking back to *Chittenden Solid Waste*'s compensation analysis, the District structured its proposal, in part, to control the scope of the taking. Id. Because the District only needed the empty

pit, it chose not to take the sand, which it offered to remove and pile for the landowner to use and sell. While this had the impact of keeping compensation costs down, it also came from the government actor's right to establish the scope of the taking. As laid out in 19 V.S.A. §§ 501 and 503, the determination of scope, design, and necessity lie with the State doing the condemning. The Court finds that there is no legal basis to compel the State to offer a specific non-monetary compensation when such is not offered in the initial scope and proposal of the taking or subsequently offered or agreed upon by the Agency.

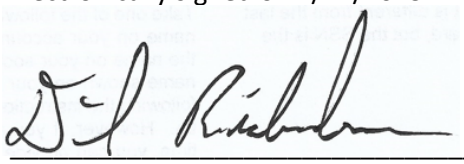
This reasoning raises one final, imbedded question. Is the proposed construction project a separate component or impact of the taking to which the State is obligated to provide additional compensation? As the undisputed facts indicate, Appellant is not contesting the scope of the taking or the monetary compensation for the land being taken. What Appellant seeks is additional compensation tied solely to the work that the State proposes to do on the property. While the compensation sought may be minimal, it is compensation tied to the activity of construction. This in turn requires the Court to examine if the construction work itself constitute a taking.

The construction is a lawful and permitted activity that is related to the taking only to the extent that it is the animated purpose, but the construction is not, in and of itself, the taking. In this respect Appellant's demand to be named as a co-insured as compensation is akin to the Appellant's demands in *Ondovchik Family Ltd. Partnership v. Agency of Transportation*. 2010 VT 35. In that case, Appellants claimed that the expansion of the highway would throw more snow from the road onto their property, which in and of itself constituted a taking. Id. at ¶ 1. The Court rejected this based on its determination that additional snow being plowed onto the property was reasonable, lawful, and limited impact on the property and any consequential damage from this activity did not constitute a taking. Id. at ¶¶ 15–19. In this case, the proposed construction is lawful, permitted, and necessary for the public good. Any potential damage is by its nature consequential damage arising from this activity. As such, it does not constitute a taking, and Appellant cannot seek additional compensation, even nominal compensation, for such activity, which falls outside of VTrans obligation to provide fair and just compensation. For these reasons, the Court finds that the proposed compensation falls outside the scope of the current taking and cannot be compelled as a matter of law.

ORDER

Based on the foregoing, the Court finds not dispute of material fact in this matter and agrees with the parties that Summary Judgment is appropriate at this phase of the case. The Court orders and adjudges that Appellant's Motion for Summary Judgment is Denied as a matter of law. VTrans' Motion for Summary **J**udgment is **Granted**. With this grant of Summary Judgment, no further hearings or motions are necessary, and the Court shall enter a final judgment in this matter dismissing the present appeal and affirming the ruling of the Administrative Law Hearing Officer. VTrans shall submit a proposed final judgment for the Court to review and adopt within 14 days.

Electronically signed on 2/22/2023 12:53 PM pursuant to V.R.E.F. 9(d)



Daniel Richardson
Superior Court Judge