

Opinion No. 64-93

July 17, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General Wayne C. Wolf, Assistant Attorney General

TO: Mr. Vance Mauney, Chairman, Board of County Commissioners, Bernalillo County, Albuquerque, New Mexico

QUESTION

STATEMENT OF FACTS

By letter agreement dated September 27, 1963, a property owner in Bernalillo County consented to immediate entry upon his land by the New Mexico State Highway Commission. This agreement is preliminary to a later final settlement by way of agreement or eminent domain proceedings for the taking of the property by the State of New Mexico. On an additional parcel of real property owned by the same individual the State Highway Commission obtained right of immediate entry pursuant to the provisions of Section 22-9-43, N.M.S.A., 1953 Compilation. The State Highway Commission obtained the order permitting entry in October of 1963. As of January 1, 1964, no settlement had occurred with respect to the taking of either parcel of property, in fact, none has occurred to date.

QUESTION

In the two factual situations described in the Statement of Facts, is the property owner liable for 1964 ad valorem property taxes on land in the possession of the State Highway Commission?

CONCLUSION

No, but see analysis.

OPINION

ANALYSIS

In both situations described in the statement of facts legal title to the land in question is still in the individual property owner even though the State Highway Commission has a right of entry upon the land for the purposes of highway construction. Section 22-9-53, N.M.S.A., 1953 Compilation (P.S.); *De Bergere v. Chaves*, 14 N.M. 352, 93 Pac. 762, aff'd 231 U.S. 482; 34 S. Ct. 144, 58 L. Ed. 325. Ordinarily legal title alone would be sufficient justification for levying ad valorem taxes and the tax would fall on the person owning the property on January 1, of each year. See **Dillard v. New Mexico State Tax**

Commission, 53 N.M. 12, 201 P. 2d 345. The first question now under consideration, however, asks whether the initiation of condemnation proceedings by the State Highway Commission would alter this general rule. There are no New Mexico cases answering this question.

There is, however, an excellent annotation at 45 A.L.R. 2d 522 that discusses the various aspects of this problem. It appears to be generally accepted that a lien against the award in condemnation exists in favor of taxes accruing before condemnation proceedings are instituted. **Chicago v. R. R. Building Corporation**, 24 Ill. 2d 20, 179 N. E. 2d 623; **State v. Clyne**, 175 Cal. App. 2d 204, 345 P. 2d 474. If the taxes accrue after the proceedings are initiated but before an award is made then the condemnee is not liable for the taxes if the condemnor has been in possession so as to destroy any beneficial use on behalf of the condemnee. **Milmar Estate Inc., v. Borough of Fort Lee**, 36 N.J. Super 241, 115 A. 2d 592; **People v. Peninsula Title Guaranty Co.**, 47 Cal. 2d 29, 301 P. 2d 1; **In re Twelfth Ward**, 58 N.Y.S. 58, 40 App. Div., 281.

In some instances the result is reached by a determination that the final vesting of title relates back to the date the condemnation was begun. **Milmar Estate, Inc., v. Borough of Fort Lee**, supra, and in others it seems to depend on the equities of the situation. **People v. Peninsula Title Co.**, supra; **In re Twelfth Ward**, supra.

In the last case cited some four years elapsed between the actual appropriation of the property and the granting of a final award of compensation. Referring to this period of time the New York Court said:

"Upon the city's theory, therefore, the owner must not alone be deprived of the unrestricted use of his property and the ad interim use of his money, but he must also be compelled to pay for its police protection, and for public improvements charged against it as a benefit, during all the period of delay, for which he is powerless to shorten . . . , if this theory be correct, the owners award would be constantly diminished by each year's delay, until, if the period were long enough, it would be entirely wiped out. It can hardly be contended that a theory which, logically followed out, would under any possible circumstances produce such a result, affords a satisfactory basis for an award of 'just compensation'."

The **Peninsula Title Guaranty** Case, supra, also indicated that the imposition of taxes after the owner's loss of possession would constitute a taking of property without just compensation. Under California law the entry on the land by the condemnor constituted a taking of the property so that taxes could not be imposed after that date unless they were included in the award made to the condemnee.

Regardless of theory, therefore, we are of the opinion that taxes accruing after the destruction of the condemnee's possession are not collectible against the condemnee unless they be included in a subsequent award of compensation. We do not feel free, however, to indicate that the taxes should be included in an award absent specific legislative authority. Therefore, the only reasonable result that can be reached is that

the condemnee is not liable for taxes accruing after the condemnor has entered the land and destroyed any beneficial possession on the part of the condemnee.

We next turn to the question of whether or not the same effect should be given to a letter agreement between a property owner and the State Highway Commission. The agreement itself does not absolutely preclude a proceeding in condemnation. It specifically states that if the compensation offered by the State Highway Commission is not acceptable to the property owner, the Commission will institute condemnation proceedings. Thus, the equities of the situation are similar to those in the first situation discussed. The Highway Commission has the right of entry on the land for its agents, employees and contractors and the original owner has not had the beneficial use of the land. The State's right of entry has amounted to possession.

The letter agreement is used by the Highway Commission to facilitate the acquisition of land with the least possible cost and delay to both the State and the property owner. In effect it is very similar to the preliminary order granting permission to enter and occupy the premises. See Section 22-9-43, N.M.S.A., 1953 Compilation (P.S.). If the parties do not agree on the amount of compensation then condemnation proceedings will be initiated to determine the amount of just compensation. In the meantime the landowner has lost beneficial use of his land. To require him to pay property taxes under such circumstances is certainly unjust.

Even though these equities exist we are aware of basic and justifiable arguments favoring the imposition of 1964 taxes on the property owner. Entry by the Highway Commission was with the permission of the owner pursuant to voluntary agreement. It might be possible for the owner to negotiate for a settlement which would include the amount of property taxes. Presumably a slight possibility exists that the highway might yet be rerouted. Administrative problems with respect to the duties of the county assessor and county treasurer would arise if the title holder on January 1, were not subject to the tax. Admittedly there is no specific statutory procedure for handling this situation although in appropriate instances the District Court may prorate taxes for the year in which sale to the State occurs. Section 72-7-26, N.M.S.A., 1953 Compilation; Attorney General's Opinion No. 61-103, October 9, 1961.

There is no doubt that the tenor of the letter agreement between the Highway Commission and the property owner is in contemplation of condemnation proceedings if an agreeable settlement is not reached by the parties to the agreement. Paragraph 4 of the agreement reads as follows:

"In the event that the offer to be submitted by the Commission to you is not acceptable to you, the Commission will thereupon immediately institute an action in condemnation and will do everything possible to accomplish an early determination of the award by condemnation procedures. Such a court award shall bear interest from the date of actual entry upon said lands by the Commission until paid at the rate of 6% per annum."

The agreement is also explicit with respect to what date shall be treated as the date of entry in any condemnation proceeding. Paragraph 5 of the agreement reads as follows:

"Both parties by entering into this agreement promise to stipulate in any such condemnation proceeding that the date of entry and the date from which interest on any such award shall commence shall be the date of entry authorized by this agreement."

From these paragraphs of the letter agreement it is easily seen that the acquisition of the property by the Highway Commission pursuant to letter agreement is much like the procedure in condemnation. It could hardly be treated as a mere purchase of property by the state, but is more like the settlement of a proposed or pending condemnation proceeding. There is no doubt that the date of entry for the purpose of subsequent condemnation proceedings would be the date of entry authorized by the letter. With these aspects of the present factual situation in mind we are of the opinion that the acquisition commenced by the letter agreement is not substantially different from that commenced by a preliminary order of entry insofar as ad valorem property taxes are concerned. We stress the importance of the possession by the Highway Commission. Without this possession and destruction of the beneficial use by the property owner the equities are entirely different. Under the facts as outlined to us and as shown in this opinion, however, we feel that the equities in this situation compel the conclusion that ad valorem property taxes for 1964 should not be levied against this property owner.